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REPORTS
OF
CIVIL AND CRIMINAL CASES
DECIDED BY THE
COURT OF APPEALS
OF KENTUCKY

ROBERT G. HIGDON, Reporter.

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AUG 10 1921

JUDICIAL OFFICERS OF THE STATE

COURT OF APPEALS OF KENTUCKY

*HON. ROLLIN HURT, Chief Justice.

ASSOCIATE JUSTICES.

HON. FLEM. D. SAMPSON,

HON. GUS. THOMAS,

HON. ERNEST S. CLARKE,

HON. HUSTON QUIN,

HON. WARNER E. SETTLE,

HON. WILLIAM ROGERS CLAY,

HON. C. C. TURNER, Commissioner.

OFFICERS OF THE COURT.

CHAS. I. DAWSON, Attorney General.

WILLIAM T. FOWLER, First Assistant Attorney General.

THOMAS B. MCGREGOR, Second Assistant Attorney General.

CHAS. W. LOGAN, Third Assistant Attorney General.

ROBERT G. HIGDON, Reporter Court of Appeals.

ROY B. SPECK, Clerk Court of Appeals.

*Became Chief Justice the first Monday in January, 1921, succeeding Judge John D. Carroll.

JUDGES OF CIRCUIT COURTS

Elected November 2, 1915, for a term of six years, beginning the first Monday in January, 1916.

1st District—BUNK GARDNER	Mayfield
2nd District—W. M. REED	Paducah
3rd District—CHARLES H. BUSH	Hopkinsville
4th District—CARL HENDERSON	Marion
5th District—JOHN L. DORSEY	Henderson
6th District—R. W. SLACK	Owensboro
7th District—JOHN S. RHEA	Russellville
8th District—McKENZIE MOSS	Bowling Green
9th District—J. R. LAYMAN	Elizabethtown
10th District—D. A. McCANDLESS	Munfordville
11th District—I. H. THURMAN	Springfield
12th District—CHARLES C. MARSHALL	Shelbyville
13th District—CHARLES A. HARDIN	Harrodsburg
14th District—ROBERT L. STOUT	Frankfort
15th District—SIDNEY GAINES	Burlington
16th District—FRANK M. TRACY (C., C. L. & E. Div.)....	Covington
16th District—M. L. HARBESON (C. L. & E. Div.)	Covington
17th District—OTTO WOLFF	Newport
18th District—L. P. FRYER	Butler
19th District—C. D. NEWELL	Maysville
20th District—WM. C. HALBERT	Vanceburg
21st District—HENRY R. PREWITT	Mt. Sterling
22nd District—CHARLES KERR	Lexington
23rd District—J. K. ROBERTS	Beattyville
24th District—J. F. BAILEY	Paintsville
25th District—W. R. SHACKELFORD	Richmond
26th District—W. T. DAVIS	Pineville
27th District—WM. LEWIS	London
28th District—B. J. BETHURUM	Somerset
29th District—JAMES C. CARTER	Tompkinsville
30th District—HARRY W. ROBINSON (Criminal Branch)....	Louisville
30th District—ARTHUR WALLACE (Chy. Br., 1st Div.)....	Louisville
30th District—SAMUEL B. KIRBY (Chy. Br., 2d Div.)....	Louisville
30th District—WM. H. FIELD (Common Pleas, 1st Div.)....	Louisville
30th District—THOS. R. GORDON (Com. Pleas, 2d Div.)....	Louisville
30th District—WALTER P. LINCOLN (Com. Pleas, 3rd Div.)	Louisville
30th District—CHAS. T. RAY (Com. Pleas, 4th Div.)....	Louisville
31st District—A. T. PATRICK	Prestonsburg
32nd District—ALLEN N. CISCO	West Liberty
33rd District—JOHN C. EVERSOLE	Hazard
34th District—R. S. ROSE	Williamsburg
35th District—ROSCOE VANOVER	Pikeville
36th District—D. W. GARDNER	Salyersville

COMMONWEALTH ATTORNEYS

Elected November 2, 1915, for a term of six years, beginning the first Monday in January, 1916.

1st District—BEN S. ADAMS	Bardwell
2nd District—JACK E. FISHER	Benton
3rd District—DENNY P. SMITH	Cadiz
4th District—CHARLES FERGUSON	Smithland
5th District—N. POWELL TAYLOR	Henderson
6th District—C. E. SMITH	Hartford
7th District—JAMES R. MALLORY	Elkton
8th District—JOHN H. GILLIAM	Scottsville
9th District—HENRY DEHAVEN MOORMAN	Hardinsburg
10th District—J. LESLIE WILLIAMS	Glasgow
11th District—B. T. HARDING	Campbellsville
12th District—CHARLES H. SANFORD	New Castle
13th District—EMMET PURYEAR	Danville
14th District—VICTOR A. BRADLEY	Georgetown
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17th District—L. J. DISKIN	Newport
18th District—JAMES C. DEDMAN	Cynthiana
19th District—B. S. GRANNIS	Flemingsburg
20th District—JOHN F. COLDIRON	Catlettsburg
21st District—W. C. HAMILTON	Mt. Sterling
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24th District—W. E. LITRELL	Paintsville
25th District—BEN A. CRUTCHER	Winchester
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27th District—GODFREY L. RADER	Annville
28th District—WALTER N. FLIPPIN	Somerset
29th District—ALLEN A. HUDDLESTON	Burksville
30th District—JOSEPH M. HUFFAKER	Louisville
31st District—JOHN D. SMITH	Prestonsburg
32nd District—JOHN W. WAUGH	Grayson
33rd District—R. B. ROBERTS	Hyden
34th District—J. B. SNYDER	Williamsburg
35th District—R. MONROE FIELDS	Whitesburg
36th District—FLOYD ARNETT	West Liberty

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HON. JOHN D. CARROLL.

Upon the first Monday in January, 1921, Hon. John D. Carroll, who was then Chief Justice of the Court of Appeals, retired as a judge of the court, after a service of fourteen years as a judge, and one year as commissioner of the court. Upon his retirement, his associates upon the bench, the officers of the court, and the Attorney General and his assistants, as a token of their esteem for him as an individual and as a judge, presented to him in open court a beautifully engraved silver pitcher, and accompanying the presentation, Chief Justice Hurt made the following remarks:

Judge Carroll:

Your late associates, on this bench, have not deemed it proper, that you should be permitted to retire from a service of fifteen years, as a judge of this court, without an expression, in a concrete way, of the esteem in which you are personally held as an associate, as well as the admiration entertained of you as a jurist. It is not deemed necessary to advert to your career as a judge, except in a general way, but we would be confessedly derelict in appreciation, if we should appear to be unmindful of the many declarations of the principles of human right, and their clarification from misconstruction and error, which have been the fruits of the many opinions of this court, of which you have been the author, and wherein, as the mouthpiece of the court, you have shed luster upon it, as a judicial tribunal. It is not doubted, that, if it is not already the common verdict of the bench and bar, that your career as a jurist has been distinguished by masterful and honorable performance, it will be so acclaimed, so soon as reason may free itself of the burden of contemporary interests, passions and prejudices. Neither is it necessary that a reminder should be had, that during the many years of your service as a member of this court, the changing conditions of society, the revolutions in economic life, and legislation, revolutionary, and otherwise, have combined to create situations and complications of circumstances, which were new and novel, to established legal principles, and where of precedents, there was an utter dearth or else scant and unsatisfactory, and to ascertain the principles governing the rights of the parties and

[a]

the public interests as applicable to such situations, in the language of Lord Erskine they had to be evolved from the "philosophy of our history, the charities of our religion and the experiences of our common lives," and in addition thereto it has been found to be necessary to requisition, the wisdom of the ages, and in the performance of these duties you have borne a conspicuous and distinguished part. The difficulties, which beset the path of a judge of a court of last resort, under the circumstances described may be more readily appreciated, when, it is remembered that the confusing complexities and bewildering intricacies arising from the events in the current affairs of human life, are so multitudinous and consistently varying, that the judge, seeking the rule of right, is, oftentimes, compelled to set sail, like one leading a forlorn hope, over the cross currents, breakers and hidden dangers of a chartless sea. The evidence of how well you have performed your share of these arduous and important duties, is preserved in a large measure, in an enduring form in the official publications of the decisions of this court, wherein, not only the contemporary bench and bar in the administration of the law, may find solid help and guidance, but those who come after us and them, will find large assistance, from the fruits of your labors, and your just fame as a jurist needs no feeble note of mine to give it notoriety and perpetuity, for the pen of history will keep a faithful vigil about it, and it does not neglect to "string on fame's eternal bead roll, those worthy to be filed." Hence, no encomium of ours can add to the just appreciation in which you are held as a jurist now and will be hereafter. There are, however, other qualities of mind and heart, on account of which we owe you esteem and admiration, and to advert to which is more in accord with the purpose now in mind. We gladly bear witness to your generous spirit of helpfulness to all the members of the court in the conduct of its duties, to the unfailing courtesy which has characterized your bearing toward your associates, and to the charity with which you have treated the opinion of a fellow, although illy fortified, and above all and beyond all, the spirit manifested by you at all times to administer the law with the single purpose of preserving the rights of all, and giving to each litigant of whatever degree his due. These are the qualities which never die. These create the friendships

[b]

which endure to the loosening of the silver cord, and the breaking of the golden bowl, to the very end of life's fitful dream.

As an abiding token of the esteem and admiration, in which the donors hold you, this testimonial is presented, and in so doing, I speak for the members of the court, and its officers, and, also, the Attorney General and his assistants. We respectfully beg that you accept it.

RESPONSE OF JUDGE CARROLL, RETIRING CHIEF JUSTICE.

Mr. Chief Justice:

I am deeply touched by your generous words of commendation of my service on the bench and your gracious expressions of regret upon my voluntary retirement. And I wish that I could find suitable words in which to convey my sincere appreciation of the beautiful and useful gift presented to me upon this occasion by you and your associates, the officers of the court, the Attorney General of the state and his assistants; but, as I cannot, I may be permitted to say that it will always be to me and my family a highly treasured article, esteemed far beyond its not small intrinsic worth on account of the happy memories its presence will forever recall.

I count as the most fortunate days of my life, crowded as they were with congenial work, the fifteen years that it was my privilege to be associated with this court—a little more than one year as commissioner and the remainder of the time as judge. During this short period I served with sixteen judges, and will carry with me to the end the most pleasant recollections of their unfailing kindness and friendship.

This court of last resort in the state holds a high place, full of honor and responsibility and power, for when there is committed to any body of men the authority to speak—except in the few cases that may find their way into the federal court—the last and final word touching not only the life, the liberty and the property of the citizen, but in everything that concerns his home, his family, his character and his peace of mind, this great power carries with it tremendous responsibilities; and I wish the people of the state might know, as I do, how faithfully and how honestly the members of this

court endeavor to find without fear or favor the right of the case and adjudge it accordingly.

It is a fortunate thing for the people of any state or country that their courts of last resort, to whose keeping they have confided so much of their safety, their security and their happiness, should be composed of men who appreciate and understand their power, the dignity of their office, and the supreme responsibilities that the discharge of its duties imposes; men who in the performance of their judicial functions are not touched by outside influences or affected by political or personal considerations; men who are free from the contention and strife, the friendships and the enmities, that in the affairs of both public and private life so often shape and control the better judgment. Of such men has the Kentucky Court of Appeals been composed during all its history.

This court, like other courts, was established to administer justice. That is at last the purpose and the end of the law; and out of the fullness of my experience I venture the assertion that in no one of the many courts sitting in this great country of ours is this dominating and ultimate purpose more firmly adhered to or conspicuously illustrated than in the decrees of the Kentucky Court of Appeals, although there are times when the mandatory nature of a controlling statute, or a long line of sound precedents or a settled and necessary rule of procedure, prevents the court from dispensing in a particular case that full measure of right and justice that it would gladly do if free to exercise its own judgment.

But it has never been and never will be possible to so frame statutes or write opinions, that, when applied to some case they must control, will not work injustice in that case; and it is the effort to avoid this hard condition in particular cases that in large part brings about the apparent if not real conflict in court opinions.

And now, in bidding a final farewell to the associations and labors of the consultation room, and having a seat for the last time on this honored bench, I leave both with the abiding faith that in the future as in the past this court will have the confidence and respect of the whole people of the state; and wish you, Mr. Chief Justice, and your brother judges that full measure of health and happiness each of you so richly deserves.

DECISIONS

OF THE

Court of Appeals of Kentucky

Jolly v. Gilbert.

(Decided November 26, 1920.)

Appeal from Daviess Circuit Court.

1. Forcible Entry and Detainer—Form of Writ.—A warrant of forcible detainer is not a pleading of the complainant and is sufficient if it conforms substantially with the form prescribed by the Code.
2. Forcible Entry and Detainer—Form of Writ.—Such a warrant is therefore not defective because it does not allege a refusal after demand to surrender possession although proof of such a refusal is necessary to a judgment of restitution.
3. Forcible Entry and Detainer—Description of Property.—A description of the property in the warrant as, "one house and lot at No. 603 St. Ann Street, in Owensboro, Daviess County, Kentucky," is sufficient.

E. C. O'REAR, WILLIAM F. WALLACE and BEN D. RINGO for appellant.

R. MILLER HOLLAND for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Upon complaint of appellee the county judge of Daviess county issued a warrant charging that appellant "did on the 2nd day of April, 1919, forcibly detain and now forcibly detains from the said James W. Gilbert house and lot at No. 603 St. Ann street, in Owensboro, Daviess county, Kentucky, &c."

Upon the inquisition before the county judge and also upon the trial of his traverse in the circuit court appellant was convicted and a judgment of restitution entered against him. From the latter judgment he has prosecuted this appeal.

The record does not contain the evidence and his only complaint is that the warrant issued by the county judge, in the exact language and form prescribed by section 454 of the Code, is defective and that the circuit court erred in overruling his motion to quash it.

It is first contended that the warrant should have contained an averment that appellant had refused upon demand after the expiration of his lease to surrender possession to appellee, since proof of such refusal is required to authorize judgment of restitution as has been held by this court in *Shepherd v. Thompson*, 2 Bush 176; *Thompson v. March*, 4 Bush 423, and *Kennedy v. Collins*, 6 Ky. Opinions 157. The vice in this argument is that it treats the warrant as a pleading by the complainant, which it is not. The warrant in form prescribed by statute is issued by the magistrate; no affidavit or written statement is required of the complainant for its issuance or of either party upon trial of same. *Tolbert v. Young*, 172 Ky. 269, 189 S. W. 209.

Although the proceeding is both authorized and regulated by the Civil Code, it conforms to the practice in criminal proceedings; and the warrant is sufficient if it conforms substantially with the form prescribed by the Code. *Smith v. White*, 2 Dana 381.

Since the warrant in this case is in exact accordance with the Code, the first contention is manifestly unsound.

It is next contended the description of the premises is insufficient, but the Code provides that the property shall be described as "one house and field on the waters of ——— in the county aforesaid or other general description of the lands or tenements," and the description in the warrant in the instant case, as quoted above, is certainly a compliance therewith.

We have held sufficient much less accurate descriptions in many cases, and this contention is also manifestly without merit. *Trent v. Colvin*, 35 S. W. 914, 18 Ky. L. R. 173; *Bush v. Coomer*, 69 S. W. 793, 24 Ky. L. R. 702.

Wherefore the judgment is affirmed.

Thompson's Extrx., et al. v. Thompson, et al.

(Decided December 10, 1920.)

Appeal from Warren Circuit Court.

1. Insurance—Assignment of Policy Payable to Wife.—Where a life insurance policy was made payable to the wife of the insured in case she survived him; otherwise to the insured, his executors, administrators or assigns, and the wife died before the insured, an assignment by him during her lifetime to his children "in case of my wife's prior death to mine" was valid although the wife did not consent to the assignment; and although the insurer did not upon notice consent thereto; and although there was no actual delivery by the assignor of the assignment or policy to his children who were infants of tender years.
2. Insurance—Assignment of Policy.—A provision in a life insurance policy that "no assignment of this policy shall take effect until written notice shall have been given the company" is for the benefit and protection of the insurer and does not affect the validity of an assignment as between the assignor and assignee.
3. Insurance—Gift by Assignment.—A gift by assignment of a life insurance policy by a father to his infant children is not invalid because of the absence of an actual delivery to and acceptance by the children, where by his acts and conduct he constitutes himself their trustee in retaining possession of the policy.

BRADBURN & HARLIN and T. W. & R. C. P. THOMAS for appellants.

GILLIAM & GILLIAM for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

The Mutual Benefit Life Insurance Company of Newark, New Jersey, issued to Walter W. Thompson two policies of insurance on his life, each for \$1,000.00, one dated June 24, 1895, and the other June 3, 1896. Each policy was payable upon the death of insured "to Emma Thompson, wife of Walter W. Thompson in case she survives the insured; otherwise to the said insured, his executors, administrators or assigns." In 1897 and during the lifetime of the beneficiary, Emma Thompson, the insured wrote the following indorsement upon each of said policies and had same attested:

"In case of my wife's prior death to mine, I hereby assign this policy to my children.

"(Signed) WALTER W. THOMPSON."

He then forwarded the policies to K. W. Smith & Co., agents of the company in Louisville, Kentucky, who later returned them to him with this letter:

"Dear Sir: The company writes June 3 as follows: We return herewith the policies sent us in cases No. 217912 and 230672, Thompson, without having taken copies of the assignment endorsed thereon, as we consider them too informal. The assignments should be upon the company's regular blanks and the names of the wife and children should be specifically given, or if it is only intended to transfer to only such children as may survive the insured, it should so appear in the assignment. Yours truly, K. W. Smith & Co."

No further attempt was made by the insured to procure the company's consent to the assignment to his children.

About ten years after the death of his wife in 1907 the insured filed the necessary affidavits with the company and requested that the policies be made payable to "his estate," which was done by the company on November 23, 1917, by the following indorsement on each of the policies:

"It appearing by affidavits filed with the company that Emma Thompson the beneficiary named, died 7th of February, 1907, this policy is now, on the written request of the insured made payable to him, his executors, administrators or assigns."

The indorsements were signed by the registrar of the company and the policies were returned to the insured and remained in his possession until his death in 1918. He was survived by four children, Ethel Thompson, James D. Thompson, Loren M. Thompson and Mrs. A. Hobdy. By his will Ethel M. Thompson was named as executrix and she qualified and is acting in that capacity. As executrix, she filed proof of his death and demanded payment to her of the policies. The other children demanded of the company that it pay to each of them one-fourth of the amount due upon the policies. The company then instituted this action against the four children and the executrix, paid the amount due under the policies into court and asked that the defendants be required to litigate among themselves their several claims thereto. Upon the issue formed between the executrix on the one hand and the other three children upon the other, the chancellor decided that the assignment made by the insured in 1897 to his children was

valid despite the company's refusal to consent thereto, and that the subsequent indorsement making the policies payable to himself, his executors, administrators or assigns, which was done without the consent of his children, was invalid. He therefore adjudged that one-fourth of the proceeds of the policies be paid to each of insured's four children, from which judgment the executrix has prosecuted this appeal.

Since Emma Thompson, wife of the insured was named as beneficiary in each of the policies and neither contains a "change of beneficiary" clause, it may be conceded that she did have a vested interest in same, as contended by appellant, which could not be impaired without her consent. But the policies were made payable to her only if she survived the insured and in the event that the insured survived her were payable to "the said insured, his executors, administrators, or assigns." Consequently, by the very terms of the beneficiary clause of each policy, the insured reserved to himself the right to make any assignment thereof that did not interfere with his wife's interest in the policies. The assignment he attempted to his children in 1897 did not in any wise interfere with the interest he had conferred upon his wife but was to take effect only "in case of my wife's prior death to mine." It is therefore clear that this assignment to the children was not invalid because of the wife's prior but not exclusive interest in the policies or because of her failure to consent to the assignment which did not prejudice or affect her interest therein. 14 R. C. L. 999; *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

Nor is this assignment by the insured to his children invalid because of the company's refusal to consent thereto although each policy contained a provision that, "No assignment of this policy shall take effect until written notice thereof shall be given to the company." In the first place written notice was given to the company, but even if this had not been done or if the policy had contained a provision that an assignment would be ineffectual without the company's consent, a failure to comply therewith would not have affected the validity of the assignment as between the assignor and assignee, since such provision in a life insurance policy is for the benefit and protection of the company alone. 25 Cyc. 771, 14 R. C. L. 998; *Lee, et al. v. Murrell*, 9 Ky. Law

Rep. 104; *Meadows' Guardian v. Meadows*, 13 Ky. Law Rep. 495.

Appellant also contends that the assignments to the children are invalid because there was no delivery of the assignments or the policies to them. All four of his children were infants of tender age at the time they were named assignees in the indorsements upon the two policies. The father retained possession of the policies as he had done from the beginning and continued to pay the premiums on same until they were fully paid up. Being a gift by the father to his infant children which he had a right to make, an actual delivery of the assignments or the policies was unnecessary to make the gift effectual. *Burges v. New York Life Insurance Co.*, Tex. Civ. App. 53 S. W. 602.

This same principle is frequently applied to gifts of all kinds of property, although ordinarily incomplete without delivery and acceptance, as was done by this court in *Williamson v. Yager*, 91 Ky. 282, and in many cases that have followed and approved it. In that case referring to a statement of the doctrine in 8 Am. and Eng. Enc. of Law 1323, we find:

"It is there said, that the title to personal property may be transferred without delivery of possession, or without consideration, by a declaration of trust. That the title to personal property can ordinarily only be transferred, by way of gift, by a delivery of the property actually or constructively to the donee, or to some person in trust for him. Also the donor may constitute himself a trustee for the donee, but in order to do this, it is necessary for the donor to clearly and unequivocally declare that he henceforth holds the property as trustee for the donee. This declaration may be done by so many words, or by acts amounting to the same thing. When this trust is clearly created by the donor, equity will uphold it, and treat the gift as executed."

Not only did the insured clearly and unequivocally declare that he would henceforth hold the policies as trustee for his children by the written and attested indorsements on same, but in addition he gave the company written notice according to the terms of the policies of such intention (which alone in some jurisdictions is held a sufficient substitute for delivery, 25 Cyc. 769); and with the policies thus indorsed he paid the premiums thereon until same were fully paid up. And not only so but it was more than twenty years after the assignments

to his children and only about a year before his death that for some reason not apparent from the record the insured attempted a revocation of the gift. It would be hard to conceive of circumstances that would furnish stronger reasons for the application of the principle of constructive delivery and acceptance for the donees by the donor as their trustee.

Since therefore the assignments to the children were valid, and they did not consent to the later indorsements it results that those indorsements were and are invalid.

Wherefore the judgment is affirmed.

Siler, et al. v. White Star Coal Company, et al.

(Decided December 10, 1920.)

Appeal from Harlan Circuit Court.

1. **Contracts—Construction.**—The cardinal rule in the construction of contracts is to ascertain from all of its terms the intention of the parties and give it such construction as will carry out that intention; but the intention to be administered is the one expressed by the words employed in the contract and not a secret, unexpressed and only mentally entertained intention.
2. **Mines and Minerals—Lease—Construction.**—A coal operating lease provided for the payment of a stipulated minimum royalty and in another clause of the contract it was agreed that if the lessee was prevented from mining sufficient coal to produce the minimum sum at the agreed rate because of certain enumerated causes and interruptions: Held, that if the lessee in any month was prevented by any of the interruptions from producing enough coal to pay the minimum royalty that sum should be reduced as provided for in the contract, since the clause providing for such interruptions operates upon and modifies the provision for the payment of a minimum royalty as much so as any other part of the contract.

TYE & SILER for appellants.

HALL & JONES for appellee, White Star Coal Co.

JAS. H. JEFFRIES for appellee, M. J. Moss.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellee, White Star Coal Company, filed this suit on August 19, 1918, against appellants, Siler and Cornett, and appellee, M. J. Moss, to obtain a construc-

tion of a written contract entered into and executed by Siler and Cornett as first parties and M. J. Moss as second party on July 28, 1916, and to obtain the direction of the court as to how plaintiff should discharge its obligations in the future under that contract, which it is conceded by all parties was entered into by defendant Moss for the plaintiff's use and benefit. Prior to the execution of the written contract involved the plaintiff was conducting a coal mining operation on a tract of land in Harlan county containing about 1,200 acres, about 650 acres of which was owned by defendants, Siler and Cornett, and the remaining 550 acres owned by the defendant, M. J. Moss, plaintiff holding a lease privilege for extracting the coal thereunder by the terms of which it agreed to pay ten cents per ton royalty for all the coal extracted, 55% of which was to be paid to Siler and Cornett and 45% of which was to be paid to M. J. Moss, but the agreed minimum royalty was to be not less than \$250.00 per month. Plaintiff had also acquired a coal operating lease to a tract of about 250 acres of land adjoining the 1,200 acres and in which none of the defendants owned any sort of title. In order to market the coal obtained from the 250 acres it was necessary to construct a tramroad over and across the land of Siler and Cornett and extending beyond the opened mines on their tract to the one of the 250 acre tract for a distance of about 3,600 feet. It was also necessary for mining operations on the 250 acres to construct miners' houses on the land of Siler and Cornett, and about 97 of them were constructed on their land, 27 of which were occupied by miners working at the Wallen mines, which is the name of the one on the 250 acres. After the extension of the tram road and the building of the additional miners' houses on their land, Siler and Cornett contended that they were entitled to additional pay over and above the royalty they were obtaining from the operation of the mine on their own land, as compensation for the easements and privileges enjoyed by the company in obtaining and marketing the coal from the 250 acre tract. To settle the dispute, which seems to have agitated the minds of all parties for some time, the written contract involved here was executed. At that time M. J. Moss and his immediate family connections owned about 80% of the stock of the White Star Coal Company and he executed the contract in question in his own name, but for the use and

benefit of his company, of which he was an officer, and he obligated himself individually therein that the company would perform all the agreements contained in the contract. The contract consists of nine (9) separate paragraphs, the first four (4) of which might be said to contain matters of inducement only and the remaining five (5) are in these words:

“(5) Now, therefore, in consideration of the fact that said first parties have let and granted and do hereby lease, let and grant unto said White Star Coal Company a right of way and easement for the purpose of removing its coal from the three leases above named and referred to, out, over and across the lands of first parties, on Ewing's creek in Harlan county, Kentucky, the said M. J. Moss now hereby agrees and binds himself, his heirs and assigns to see that the White Star Coal Company will mine and remove, or have mined and removed, sufficient coal to increase the royalty due first parties and second party from the lands that are now leased to White Star Coal Company, and which are now being operated by it, to a minimum royalty of \$750.00 per month, said increase in minimum royalty to begin June 1, 1917, and to continue during the life of the original leases to it and its predecessors, which the White Star Coal Company is operating from the lands of first parties and second party; and

“(6) Whereas, under an agreement between first parties and second party, 55% of the \$750.00 royalty per month, amounting to \$412.50, is due to first parties, and 45% of the \$750.00 royalty per month, or \$337.50, is due to second party.

“(7) It is now agreed by and between first parties and second party that in any month after June 1, 1917, that the White Star Coal Company does not produce sufficient coal from the lands of first parties to pay said first parties their 55% of \$750.00 royalty per month, amounting to \$412.50, that second party, to-wit, M. J. Moss, will pay immediately to first party a sufficient amount when added to the amount paid during such month by White Star Coal Company to make \$412.50 for each and every month; and

“(8) The White Star Coal Company, after June 1, 1917, is hereby authorized and directed in paying royalties to first parties and second party, to first pay to first parties, out of all royalties due both first parties and second party, the sum of \$412.50, each month, and

the remainder, up to \$750.00, to be paid to second party; all royalties above \$750.00 per month to be divided 55% to first parties and 45% to second party.

“(9) It is further hereby agreed between the parties hereto, that if at any time the White Star Coal Company shall be prevented from carrying out any and all of the covenants of the leases under which it is operating, by reason of epidemics, riots, insurrections, strikes, wars, car shortages or by failure of workable supply of coal on premises of first parties and second party, or occurrences of faults or other obstructions in mines, or by reason of any other outside conditions over which the White Star Coal Company has no control, and which is without fault or negligence on the part of said White Star Coal Company, then the minimum royalty of \$750.00, as above stated, shall be reduced in proportion to the time lost by said interruptions by said above named causes.”

It is the contention of appellants, Siler and Cornett, that under the terms of the above contract they are entitled absolutely to their proportion of the minimum royalty provided therein of \$412.50 per month regardless of the occurrence of any interruptions on account of any of the causes stated in paragraph (9) of the contract, and that the contract obligates the White Star Coal Company to pay to them in any event their stated proportion of the minimum royalty each month and obligates M. J. Moss to do so if the coal company should fail, although some or all of the interrupting causes stated in paragraph (9) might prevent the mining of sufficient coal for the royalty to amount to that sum. The company and M. J. Moss insist that the interrupting causes in that clause operate upon and qualify all other clauses of the contract, including those fixing the minimum royalty and providing for its payment, and that if the company should be prevented by any such causes from mining sufficient coal in any month for the stipulated ten cents royalty to equal the minimum amount provided for such amount should be reduced, as is provided in paragraph (9). The trial court upon final submission construed the contract as contended for by the company and M. J. Moss, and being dissatisfied with that construction Siler and Cornett prosecute this appeal.

The cardinal rule governing courts in the interpretation of contracts is to ascertain the intention of the par-

ties thereto and give effect to that intention; but *the intention* which this rule applies is the one to be gathered from the words which the parties employ in stating their contract and not to any unexpressed or mental intention which they may have entertained but which they did not express, and in arriving at the intention which the terms employed import and manifest the entire contract should be looked to. 6 R. C. L. 835-837; Nelson Creek Coal Co. v. West Point Brick and Lumber Co., 151 Ky. 835; Owens v. Georgia Life Insurance Co., 165 Ky. 507; General Accident, Fire and Life Insurance Corporation v. Louisville Home Telephone Co., 175 Ky. 96, L. R. A. 1917D, 952; Miller v. New York Life Insurance Co., 179 Ky. 246, and Gabbard v. Sheffield, 179 Ky. 442. Stating these general rules (which this court in above cases approved) the text in R. C. L., referred to on page 835, says:

“It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract, and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties, and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used.”

And on page 837 it is further stated that:

“The intention of the parties, which courts seek to discover in giving construction to a contract, is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely in disjointed or particular parts of it. The whole context is to be considered in as-

certaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end and all its terms must pass in review; for one clause may modify, limit, or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course."

Guided by these universally applied and undeviating rules for the construction of contracts we can find no possible ground to question the propriety of the court's judgment. It is proven and not denied that paragraph (9) in the contract involved here is the usual and customary one incorporated in all coal mining leases, especially in the coal mining fields of which Harlan county is a part. This fact is conceded by appellants, but they insist that the contract involved here is something more than an ordinary coal lease contract, since it grants easements and privileges necessary for mining *other* land and not ordinarily included in such contracts, and it is therefore urged that the payment of the minimum royalty each month regardless of the contingencies provided for in paragraph (9) was the consideration for such easements and privileges. This argument loses sight of the fact that the contract of July 28, 1916, increased the minimum royalty of appellants from \$150.00 per month, which they were theretofore getting as their proportion, to \$412.50 per month, which increase was evidently made in payment of the additional easements and privileges over and across the land of appellants. To uphold the construction contended for by appellants would result in ignoring entirely paragraph (9) of the contract and to administer it, so far as appellants are concerned, as if that paragraph constituted no part of it. Such an interpretation would be in the teeth of the rules above laid down for the guidance of courts in the construction of contracts. If paragraph (9) does not operate to reduce the minimum royalty of appellants, Siler and Cornett, as between them and the coal company, it would likewise not operate to reduce the minimum royalty stipulated to be paid M. J. Moss. Giving all parts of the contract

the meaning which the words employed naturally import, there is no escape from the conclusion that it was the intention of the parties in executing the contract of July 28, 1916, to provide that the coal company should pay a total minimum royalty of \$750.00 per month, and that it should pay that amount notwithstanding it failed to mine enough coal at the royalty rate to produce it, unless such failure was produced by some of the causes or interruptions stated in paragraph (9) of the contract, but if the company was prevented from mining sufficient coal to pay the minimum royalty at ten cents per ton because of any interruptions included therein, then the minimum royalty should be "reduced in proportion to the time lost by said interruption;" and M. J. Moss assumed the liability of a guarantor to Siler and Cornett that the coal company would perform all of its obligations under the contract. The judgment of the court having interpreted the contract as indicated fully meets our approval and it is affirmed.

Hoffman v. Hoffman.

(Decided December 10, 1920.)

Appeal from Jefferson Circuit Court (Chancery Branch, First Division).

1. Divorce—Appeal—Appellate Jurisdiction.—Though the Court of Appeals is without power to reverse a judgment of divorce, it may review the judgment in other respects where the amount or rights involved are such as to confer jurisdiction.
2. Appeal and Error—Judgment for Alimony.—Since the jurisdiction of the Court of Appeals in actions for the recovery of money is limited to cases where the amount in controversy is \$200.00, exclusive of interest and costs, and since the court below may set aside the allowance of alimony and maintenance, or the husband may die, and thus the amount in controversy may never equal the amount necessary to confer jurisdiction, the court is without jurisdiction to entertain an appeal from an order directing the husband to pay the wife \$11.00 a month for alimony and maintenance of children.
3. Appeal and Error—Divorce—Custody and Support of Children.—The Court of Appeals has the power to review a judgment of divorce in so far as it affects the custody of children, and having jurisdiction for that purpose, it has jurisdiction for all purposes, and may review the allowance of alimony and maintenance, as

well as the allowance to plaintiff's attorneys, though the amounts involved are not sufficient to confer jurisdiction.

4. Divorce—Custody of Children.—In a case of divorce it is a settled practice to award children of tender years, especially girls, to their mother, unless it be made to appear that she is an unsuitable person.
5. Divorce—Right to Alimony.—Where a divorce is granted, the wife is entitled to alimony, though not free from blame, where no moral delinquency on her part is shown, and it appears that the husband was a substantial participant in the shortcomings which led to the separation.
6. Divorce—Alimony—Maintenance of Children.—Where the husband has an income of \$16.00 a week from his business and owns five pieces of property which are worth several hundred dollars more than the encumbrances thereon, an allowance of \$11.00 a week for alimony and maintenance of two infant children will not be increased or decreased in view of the fact that the chancellor may modify the allowance in case the circumstances of the parties require it.
7. Divorce—Attorney's Fee—Liability of Husband.—Under section 900, Kentucky Statutes, the husband, in actions for alimony and divorce, is liable for all costs, including a reasonable compensation to his wife's attorney, unless it be made to appear, first, that the wife was in fault, and, second, that she has ample estate to pay the costs.
8. Divorce—Attorney's Fee—Liability of Husband—Sufficiency of Wife's Estate.—Where there is an encumbrance on the wife's property of \$750.00, and it does not appear whether the interest thereon has been kept up and the taxes paid, or that the property would bring any substantial sum in excess of the debt and the interest, it cannot be said that she has ample estate to pay the costs, and the husband will be held liable for her attorney's fee.
9. Divorce—Divorce From Bed and Board—Restoration of Property.—Where a divorce was granted merely from bed and board, an order directing that the parties restore to each other all the property which either may have obtained, directly or indirectly, from the other during the marriage, and in consideration or by reason thereof, was error, such an order of restoration not being authorized by the statute and Code except in case of absolute divorce.

HENRY J. TILFORD for appellant.

BECKHAM OVERSTREET for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,
COMMISSIONER—Affirming on original appeal and reversing on cross appeal.

Amelia Hoffman sued her husband, Charles F. Hoffman, for divorce and alimony and the custody of their

infant children. Defendant filed an answer and counterclaim denying the allegations of the petition, and asking a divorce from plaintiff. On final hearing the parties were granted a divorce from bed and board, and plaintiff was awarded the custody of the children. In addition to her costs, including her attorney's fee of \$125.00, plaintiff was also awarded alimony in the sum of \$3.00 per week and \$8.00 per week for the maintenance of the children. Claiming that the judgment is erroneous in so far as it awards plaintiff the custody of the children and requires defendant to pay alimony and maintenance and the fee of plaintiff's attorney, defendant appeals, while plaintiff prosecutes a cross appeal, claiming that the allowance to her attorney and the amounts awarded for alimony and maintenance were too small.

Though we are without power to reverse the judgment of divorce, we may review the judgment in other respects where the amount or rights involved are such as to confer jurisdiction. *Shehan v. Shehan*, 152 Ky. 191, 153 S. W. 243; *Benedict v. Benedict*, 165 Ky. 499, 177 S. W. 245; *Sloan v. Sloan's Admr.*, 185 Ky. 369, 215 S. W. 38. Since our jurisdiction in an action for the recovery of money is confined to cases where the amount in controversy is \$200.00, exclusive of interest and costs, and since the court below has the power to set aside the allowance of \$11.00 per month for alimony and maintenance, or the appellant may die, and thus the amount in controversy may never equal the amount necessary to confer jurisdiction, it is apparent, under the rule announced in *Van Meter v. Van Meter*, 168 Ky. 782, 182 S. W. 950, and followed in the case of *Young v. Young*, 171 Ky. 753, 188 S. W. 775, that this court would be without jurisdiction to entertain the appeal if the right to an appeal depended solely on the amount allowed for alimony and maintenance. But, having jurisdiction for the purpose of reviewing the judgment in so far as it affects the custody of the children, we have jurisdiction for all purposes, and may therefore review the allowance of alimony and maintenance as well as the allowance to plaintiff's attorney.

Plaintiff and defendant have two children, both girls. The younger is about three years of age, while the elder is about four and one-half years of age. Having in view the welfare of the children it is our settled practice in cases of divorce to award the custody of children of tender years, especially girls, to the mother, unless it be

made to appear that she is not a suitable person. *Wills v. Wills*, 168 Ky. 35, 181 S. W. 619. The evidence does not show that plaintiff is not a suitable person, and hence the chancellor did not err in awarding to her the custody of the children.

It would serve no good purpose to detail the evidence on the relations of the parties. While it may be true that plaintiff was partly to blame, the evidence leaves no doubt that defendant was a substantial participant in the shortcomings which led to the separation. That being true, and no moral delinquency on the part of plaintiff having been shown, the chancellor properly adjudged that she was entitled to alimony. *Griffin v. Griffin*, 8 B. Mon. 120; *Green v. Green*, 152 Ky. 486, 153 S. W. 775. Defendant was not perfectly frank in stating the amount of his income or the value of his property. He admits an income from his business of about \$16.00 a week. In addition to this, he owns five pieces of property which are worth several hundred dollars more than the encumbrances thereon. In view of these facts, and of the further fact that the chancellor may modify the allowance in case the circumstances of the parties require it, we perceive no reason why the amount should be increased or decreased at this time.

It appears that the title to the house in which the parties lived at the time of their separation was in plaintiff. It is therefore contended that as plaintiff was at fault and had property, defendant should not have been required to pay her attorney's fee. Under our statute, the husband, in actions for alimony and divorce, is liable for all costs, including a reasonable compensation to his wife's attorney, unless it be made to appear, first, that the wife is in fault, and, second, that she has ample estate to pay the costs. Section 900, Kentucky Statutes; *Steele v. Steele*, 119 Ky. 466, 84 S. W. 516. The property to which the wife has title is encumbered for \$750.00. Whether the interest has been kept up and the taxes paid does not appear, nor is it clear that if the property were sold it would bring any substantial sum in excess of the debt and the interest. That being true, we cannot say that the wife has ample estate to pay the costs. Hence the chancellor did not err in holding that defendant should pay plaintiff's attorney's fee, which, we think, was fully as much as, but not more than, his services were reasonably worth.

As part of the decree the chancellor adjudged that the parties restore to each other all the property which either may have obtained directly or indirectly from the other during the marriage, and in consideration or by reason thereof. This was error for the reason that the divorce was merely from bed and board, and it is only in cases of absolute divorce that such an order of restoration is authorized by the statute and Code. Section 2121, Kentucky Statutes; section 425, Civil Code; Orr v. Orr, 8 Bush 156. On the return of the case the court will set aside the order in question.

Judgment affirmed on original appeal and reversed on cross appeal for proceedings not inconsistent with this opinion. Whole court sitting. Judges Thomas and Quin dissenting from so much of the opinion as holds that an appeal would not lie if only the question of alimony and maintenance were involved.

Coleman v. Louisville & Nashville Railroad Company.

(Decided December 14, 1920.)

Appeal from Pendleton Circuit Court.

1. **Waters and Water Courses—Overflow—Measure of Damages.**—Where a permanent obstruction is erected by a railroad company in a river which caused the water to overflow the lands of another, the measure of damages to which the landowner is entitled is the difference in the reasonable market value of the lands immediately before the obstruction was placed in the river and immediately thereafter.
2. **Waters and Water Courses—Damages—Cause of Action.**—In such case a plaintiff can have but one recovery, for he must sue for all damages past, present and prospective or contingent, and his cause of action accrues when the structure is completed, or at least when first injury is occasioned.

M. C. SWINFORD and A. H. BARKER for appellant.

L. T. APPLGATE, C. D. IHRIG and BENJAMIN D. WARFIELD for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

In the construction of its double track along the east side of the South fork of Licking river in Pendleton county, the Louisville & Nashville Railroad Company

dumped a lot of stone and dirt into the river, making several large obstructions which caused the water in the river in ordinary freshets to overflow in part the lands of J. W. Coleman lying on the west side of the river. The road was constructed in 1911, 1912 and 1913, and some time after the obstructions were placed in the river the water was caused to overflow the lands of Coleman in such way as to destroy his crops, and the railroad company acknowledging its liability compromised with him and paid him \$375.00 in damages. In the spring of 1917 water again overflowed the lands of Coleman destroying his crops and he brought this action against the company to recover damages therefor in the sum of \$700.00. The railroad company answered denying the allegations of the petition but pleading in a second paragraph that the obstructions in the river were made necessary in the construction of the road and that they could not be removed without great expense and the destruction of the roadbed, and further "that whatever injuries, if any, plaintiff has sustained by reason of said construction are permanent injuries; that the defendant is entitled to have plaintiff set up all his said injuries in this action or be forever thereafter estopped from so doing." Thereupon the plaintiff Coleman filed an amended petition alleging in substance that the railroad was constructed between the years 1911 and 1915, and that it had willfully, wantonly, unlawfully, recklessly, negligently and carelessly, through its agents and employees, at various and sundry times, piled rock, dirt, trees, stumps, ties and various other hard substances into the said river in such way and manner as to obstruct the flow of the water and to divert it from its natural channel in ordinary freshets and to overflow the lands of plaintiff which overflow had washed and greatly deteriorated his lands and destroyed thirty-five acres thereof and certain crops. He prayed damages in the sum of \$3,500.00. Issue being joined a trial was had, the jury returning a verdict for \$500.00 in favor of Coleman, and he being dissatisfied with the verdict and judgment entered thereon, appeals to this court assigning as grounds for a reversal: (1) Error of the court in permitting incompetent evidence to be heard which was to the prejudice of the plaintiff and in refusing competent evidence offered by the plaintiff; (2) because the court erred to the prejudice of plaintiff in its instructions to the jury. It is admitted by both parties that the ob-

structions in the river and the embankments erected by the railroad company are of such nature as to be permanent and the injury to the lands of plaintiff are and were of a permanent and lasting nature.

With respect to the first complaint of appellant he states in his brief that the trial court in the beginning of the introduction of the plaintiff's evidence concerning the extent of the damages suffered by Coleman ruled that the evidence must be directed to the value of the lands after it was discovered that the dumps caused the lands to overflow and that this discovery was made in 1915, whereas this action was filed in 1917 and the amended petition in 1918, and the trial had in 1919.

The gist of this complaint is that the trial court required the plaintiff Coleman to confine his evidence to the value of the land immediately before the obstructions were placed in the river and immediately after the obstructions were discovered to be of such size and nature as to divert the water from the natural channel of the river and cause it to overflow the plaintiff's lands.

It is a well settled principle of law governing in cases of this kind that where the structure which obstructs the flow of the water and casts it upon the lands of the plaintiff is permanent in its nature, the plaintiff can have but one action—one recovery—for he must sue for all damages, past, present and prospective or contingent, and that the cause of action accrues when the structure is completed, or at least when the first injury is occasioned to plaintiff's property, and the measure of damage is the difference in the market value of the lands before and after the injury. *Board of Park Commissioners of City of Louisville v. Donahue*, 140 Ky. 502, 21 R. 873; *Kentucky Lumber Co. v. King*, 65 S. W. 156; *Illinois Central R. R. Co. v. Smith*, 110 Ky. 203, 30 R. 1239; *Pickerell v. City of Louisville, et al.*, 100 S. W. 873; *Louisville & N. R. R. Co. v. Ponder, et al.*, 104 S. W. 279; 17 *Corpus Juris*, pp. 1039 and 1040; 8 R. C. L., pp. 539, 540 and 542.

As the obstructions were placed in the river before the year 1915, and were of a permanent and lasting nature, and the water was caused to and did overflow the lands of plaintiff causing damage about that time, it follows the trial court properly required Coleman to confine his evidence to the value of the lands immediately before the obstructions were placed in the river and the value of the lands immediately thereafter, and

after it was manifest that the obstructions, permanent in their nature, would divert the water of the stream from its regular course and cast it upon the lands of plaintiff and this water would deteriorate the lands and destroy the growing crops. Of course, the court properly allowed Coleman to show that his crops were destroyed in the spring of 1917, as this was a part of the damage incurred, but this does not alter the rule that the measure of damage to real property from an overflow of water caused by a permanent structure is the difference between the reasonable market value of the lands immediately before and immediately after the completion of the structure and the occasion of the first overflow resulting therefrom.

Appellant urges a reversal of the judgment because the court improperly allowed the defendant company to prove the sale price of other lands contiguous to that of the plaintiff as far back as 1914.

As a general rule it is improper to admit evidence in chief of the amount for which adjoining tracts of land were sold as bearing upon the value of the land of plaintiff. But when the lands are of a similar nature and in the same vicinity a sale had at not too remote a time may be shown to aid the jury in determining the market value of the property under consideration. At any rate, we do not think that the evidence introduced in this case concerning the sale price of contiguous property nor of lands in that vicinity was prejudicial to appellant Coleman. 17 Corpus Juris 1040.

Perceiving no error to the prejudice of appellant the judgment is affirmed.

Pratt v. Hays.

(Decided December 14, 1920.)

Appeal from Barren Circuit Court.

1. Mines and Minerals—Lease Contracts.—An oil lease which provides that in the event operations are begun on the ease but are discontinued for sixty consecutive days the lease shall be null and void, is null and void and unenforceable in so far as the lessee is concerned after abandonment for more than sixty days after drilling a well thereon.

2. **Mines and Minerals—Lease—Abandonment.**—A lessee who drills a dry hole on an oil lease and then moves the machine away and works on another lease thereby abandons the first lease unless a clear intention to hold the lease otherwise appears.

W. L. PORTER for appellant.

G. L. JONES and BASIL RICHARDSON for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

By this proceeding Mrs. Annie Hays of Barren county seeks the cancellation of an oil lease on her farm, executed by her to appellant, T. W. Pratt, in 1917, on the ground that the grantee in the lease has failed to comply with the terms thereof, and especially a clause which provides for a forfeiture of the lease. The lease was executed on June 7, 1917, and by its provisions Pratt was to begin operations upon the lands within six months from its date. Operations were begun on the land by the agent of Pratt, moving an oil drilling machine thereon, and drilling a well about four hundred feet deep in which was placed about one hundred and forty-five feet of casing. The well was non-productive. On the 30th day of August, 1917, appellant Pratt ceased to operate the machine or to do any work of development on the premises, and his agents went away leaving the machine standing over a dry hole. In the latter part of October of the same year, the machine was moved from the premises of Mrs. Hays on to that of another landowner, and nothing more was done on the Hays lease until the bringing of this action in August, 1918. It will thus be seen that the appellant Pratt did nothing which could be called operation or any development work on the Hays lease for almost twelve months next before the commencement of this action. By the lease it is provided "that this lease shall become null and void and all rights hereunder shall cease and determine, unless operations shall be commenced on said premises within six months from the date hereof, or unless the lessee shall elect to pay \$185.00 dollars, semi-annually thereafter, until operations are commenced . . . If after operations are begun on this lease they are discontinued for sixty consecutive days, this lease is null and void."

This action was brought by Mrs. Hays to enforce the latter part of the clause quoted above, and the lower

court held it null and void and cancelled the lease. Pratt appeals.

The only reason assigned for a reversal of the judgment in brief of counsel for Pratt is the following:

"It is insisted for appellant that a reasonable construction of the contract under the facts would be to allow appellant a reasonable time to put down another well; in fact the casing was left in the well drilled. There was no oil found in it and of course the well could not be operated beneficially either to the appellee or the appellant and if the clause was put in the lease to compel appellant to operate such wells as oil was discovered in, then it would be folly to operate a well in which there was no oil. The term 'operation' used in the lease would mean not only putting down the well, but if oil was found to produce the oil or pump the well and market the oil.

"And it is unreasonable to construe the lease to mean that after a dry hole was drilled the appellant should continue to drill other wells without first ascertaining the trend of the oil sand. As it is inserted the word operate in this means the operation of an oil well, if oil is found in paying quantities."

It is conceded that Pratt began operation on the lease; that he ceased operation on the lease about August 30, 1917, and that he did not again go on the lease before the commencement of this action, which was almost twelve months after operation ceased on the lease. Thus there appears to be a flagrant violation of the terms of the lease which comes clearly within the forfeiture clause, reading: "If after operations are begun on this lease they shall discontinue for sixty consecutive days, this lease is null and void." This provision is plain and unambiguous and the facts are not disputed. When Pratt moved his machine away from the premises he indicated an intention to abandon the lease and at the expiration of the period of sixty days from the day on which operations ceased on the lease it became by its terms "null and void," and Pratt had no further rights on the premises.

The word "operations" as used in the lease means the drilling for and the production and marketing of oil or gas upon and from the premises, and when Pratt ceased to drill or otherwise explore the premises for oil or gas and moved the machine away from the premises he came clearly within the terms of the forfeiture clause

at the end of the sixty day period; and this was so even though he had theretofore drilled a dry hole on the lease and left the casing in it.

The lower court committed no error in adjudging the lease cancelled, and the judgment is affirmed.

Judgment affirmed.

**Security Life Insurance Co. of America v. Black, Jr.'s
Administrator.**

(Decided December 14, 1920.)

Appeal from Ohio Circuit Court.

1. Insurance—Misrepresentation in Application.—Under section 639, Kentucky Statutes, a material misrepresentation made in an application for a life insurance policy will prevent a recovery upon it, although the misrepresentation was innocently made, and in the belief of its truth.
2. Insurance—Misrepresentation in Application.—A misrepresentation is where one states as a fact, that which he knows is not a fact, with the intention to deceive; or states that as a fact, which he does not know to be true, and which has a tendency to mislead.
3. Insurance—Misrepresentation.—A material misrepresentation is as effective in defeating an insurance contract, as a breach of a warranty.

J. S. GLENN for appellant.

HEAVRIN & MARTIN for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

The decedent, Frank Black, made application to the appellant, Security Life Ins. Co. of America, to secure a policy insuring his life in the sum of \$1,000.00. The policy was issued and the insured thereafter died, and the appellant refusing to pay the amount of the insurance to the administrator of the insured, this action was instituted for its recovery and resulted in a verdict of the jury and judgment of the court in favor of the administrator. A motion for a new trial having been overruled, the insurance company has appealed.

The application consisted of two parts, one of which was a formal application containing answers to questions propounded, and the other the examination of the

applicant by the medical examiner, and containing the questions and answers propounded and answered in that examination and both were made a portion of the policy contract, and in consideration of which the policy was issued. The first part of the application contained the following stipulation: "It is hereby agreed that all the statements made herein and any amendments or supplements hereto, and also those I made to the company's medical examiner which are hereby made a part of this application, are full, complete and true, and shall in the absence of fraud be deemed representations and not warranties, and are offered to the company as a consideration for the policy applied for, . . ."

The following questions were asked by the medical examiner, and the following answers were made by the insured:

"State all the ailments, diseases or disorders with which you are now afflicted? None.

Have you ever had any of the following diseases or conditions: Spitting of blood? No.

Have you been associated during the last year with a person who has had consumption? No.

Been living in a house recently occupied by such a person? No.

Family History	Age If Living	Condition of Health	Age at Death	Date of Death	Cause of death	How long ill?	Previous health
		Good					
Father		(If not explain)	42	1917	Pneumonia	5 days	Fairly good
Mother			36	1914	Don't know	6 days	Fairly good

Have any members of your family, including uncles and aunts had consumption? No."

The above was followed by the following stipulation: "It is hereby agreed: That the foregoing statements and answers made to the company's medical examiner, are full, complete and true, and shall in the absence of fraud, be deemed representations and not warranties, and are offered to the company as a consideration of the contract and to complete the application for insurance heretofore made." The foregoing medical examination and stipulation were subscribed by the insured as well as the first part of the application.

The policy contained a statement that it was issued in consideration of the application which was made a

part of it and contained the following covenant: "All statements made by the insured shall in the absence of fraud be deemed representations and not warranties, and no such statement shall void this policy, unless it is contained in the application therefor."

The insurance company by its answer denied any liability upon the policy, and alleged that the foregoing answers made by the insured in his application were untrue, and that the information sought by the questions to which the answers were made were matters material to the risk assumed in insuring the life of the decedent, and that it, in entering into the insurance contract relied upon the truth of the answers, and would not have made the contract if it had known the true facts; that the insured had in fact been, before making the answers, afflicted with the condition of spitting of blood, caused by a hemorrhage of the lungs, and thereafter died from tuberculosis; that his father and mother were, both, for many years previous to their deaths, afflicted with consumption; that the insured had associated recently with his father, and resided in the same house with him during the year preceding the making of the application, and that both the father and mother of decedent had died from consumption. These averments were denied by reply.

There was an entire lack of evidence, which tended to prove, that the statements of the insured, with reference to his previous health, or spitting of blood, or the ages of his father and mother at the time of their respective deaths, or the cause of his father's death, or his want of knowledge of the cause of the death of his mother, or the duration of the sickness, which caused their respective deaths, were not substantially true, but, with reference to his statements that during the last year he had not been associated with a person, who had consumption, and had not been living in a house recently occupied by a consumptive, and that no member of his family had had consumption, and that the health of his parents was fairly good, previous to the sickness from which they died, the evidence as to whether or not such statements were substantially untrue, was contradictory. There was evidence, which conduced to prove, that his parents were afflicted with the form of tuberculosis, ordinarily called consumption, for a period of years previous to their respective deaths, and that he had during the year, in which the application was made, asso-

ciated with his father, by living in the same dwelling house with him, and had been residing in the same house for some years which his father at the same time had occupied, and until the death of the father about one month before the application. The evidence was such as required the issue as to the substantial truth of the statements of the insured, upon these subjects, to be submitted under proper instructions to the jury. The court in submitting to the jury, the issue, as to the substantial untruth of the representations made by the insured, in his application for the policy, and in defining a material and untrue representation, such as would void the policy, did it in the following language:

“Now if you believe from the evidence, that all or any one of said answers were substantially untrue to the best of the knowledge and belief of the applicant, Frank Black, Jr., and, if you further believe from the evidence, that according to the course of business usually followed by insurance companies, engaged in insuring the lives of persons, the defendant acting reasonably and naturally, would not have accepted such application, nor have issued the policy sued on, if the truth, to the best of the knowledge and belief of the said applicant, had been stated in the application, then you will find for the defendant.” It will be observed, that by the instruction, the question as to whether or not the representations were, in fact, true, was not submitted to the jury, but, the issue submitted was the good faith and belief of the insured as to the truth of the representations, and the definition of such a material, and untrue representation as would avoid the payment of the policy was not an untrue representation, in fact, but, such a one as the insured in good faith believed to be untrue from his knowledge and belief as to the facts. There is at once apparent a wide difference between the existence of a fact, in truth, and the belief of one that such fact exists, as his belief may be founded upon a want of information, and one may not know or believe that a statement of a fact made is untrue, because he may know nothing upon the subject. In several jurisdictions, there exist statute laws, which provide, in substance, that representations made by an applicant for life insurance, though in fact untrue, will not void the policy, unless the representations were made in bad faith, with the purpose to deceive, or the concealment of some fact, which good faith required him to divulge; in other jurisdictions it is held

that representations and even warranties of the truth of statements made in applications for life insurance are only warranties of the good faith of the applicant, when he makes answers concerning matters, about which he does not have or is not presumed to have personal knowledge, or concerning statements, as to facts, which exist only in opinion. Many cases have turned upon the construction of the insurance contract, where from its terms, it is apparent that the parties have contracted only for the honesty and good faith of the applicant in making representations. In other jurisdictions, the insured in making representations is held only to his belief in their truth, and no representation is allowed to defeat an insurance contract, unless the representation amounts to an actual or a legal fraud. In other jurisdictions, it is held, that a representation, which is material to the risk, and untrue, will defeat the policy, regardless of the good faith of the insured. The result of these statutes and divergent views, has produced more or less conflict between the decisions in the different jurisdictions, both state and federal, and hence recourse must be had, in each jurisdiction to the peculiar statute laws, where any exist upon the subject, and in contemplation of which the insurance contracts are made. In 1874, the general assembly of Kentucky, adopted a statute, which is now section 639, Kentucky Statutes, and which provides as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."

Hence statements and descriptions in an application for a policy of insurance which theretofore were held to be warranties, by the force of this statute are made representations, and it is conclusively presumed, that parties, who enter into insurance contracts do so in contemplation of the statute, and agree that the statements and descriptions made by the insured in the application are representations, only. The statute has, also, dispensed with any misrepresentation as a defense to a recovery upon the policy, unless it is a misrepresentation concerning a matter, which is material to the risk assumed by the insurance company, in entering into the contract, or is a misrepresentation made fraudulently. It follows, that a misrepresentation which is either material or fraudulent will void the policy. The statute

does not ordain that the misrepresentation must be both material and fraudulent, to be effective as a defense to recovery upon the policy. Hence, it follows, that if a material misrepresentation is made, though innocently, the good faith and honest belief of the insured, in its truth, will not protect the policy contract from defeat. Such rule has been consistently adhered to in this court, and it was said in *Germania Insurance Company against Rudevig*, 80 Ky. 235, that the statute, *supra*, was declaratory of the common law prevailing in this jurisdiction, theretofore. *M. L. A., etc. v. Robinson*, 149 Ky. 80; *Blinke v. Citizens' Life Ins. Co.*, 145 Ky. 332; *Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397; *Provident Savings Life Ins. Co. v. Dees*, 120 Ky. 285; *Provident Savings Life Ins. Co. v. Whayne*, 131 Ky. 84; *Aetna Life Ins. Co. v. Crabtree*, 146 Ky. 371; *Brotherhood, etc. v. Swearinger*, 161 Ky. 677; *Knights of Maccabees, etc. v. Shields*, 156 Ky. 270; *Ill. Life Ins. Co. v. Delang*, 124 Ky. 569; *Brisson v. Metropolitan Life Ins. Co.*, 115 S. W. 785; *Supreme Lodge K. of P. v. Bradley*, 141 Ky. 334; *National Protective Legion v. Allpine*, 141 Ky. 777; *Union Central Life Ins. Co. v. Lee*, 47 S. W. 614; *Mutual Life Ins. Co. v. Thompson*, 94 Ky. 253; *Galbraith's Admr. v. Arlington Life Ins. Co.*, 12 Bush 40. In the instant case, the parties contracted that the statements of the insured, should be held to be representations and not warranties, unless fraudulently made, and while this agreement, under the statute, did not change the character of the statements from representations to warranties, though fraudulently made, a material misrepresentation, is as effective in voiding a policy of life insurance, as a breach of warranty would do, in the absence of the statute. The insured agreed that the statements were full, complete and true answers to the questions asked, and he represented the subject of the statements, as facts, and hence if the representations were substantially untrue, in fact, and material to the risk, the effect would be the defeat of the policy contract, regardless of the insured having made the statements under the mistaken belief of their truth. Hence, the qualifying words, "to the best of the knowledge and belief of the applicant," nor any phrase of similar meaning, should have been incorporated in the instruction, but, the issue should have been simply, whether or not the answers to the questions were sub-

stantially untrue. This error was prejudicially erroneous to appellant. No other errors appear in the trial.

The instruction offered by appellee, upon the subject of appellant, not relying upon the representations made by the insured in his application, but, of its having received and having sought information through other channels, and therefore was estopped to rely upon the falsity of the representations, was properly refused, as the evidence did not conduce to prove, that appellant knew of the falsity of the representations, when it issued the policy and accepted the premium, and such evidence would have been necessary to justify such an instruction. *Reserve Loan Life Ins. Co. v. Boreing*, 157 Ky. 730; *Masonic Life Ass'n. v. Robinson*, 149 Ky. 80.

The judgment is reversed and cause remanded for proceedings not inconsistent with this opinion.

Lang, Judge v. Commonwealth.

(Decided December 14, 1920.)

Appeal from Franklin Circuit Court.

1. **Statutes—Subjects and Titles of Acts.**—An act of the general assembly which has but one subject, and that is expressed in its title, and all the provisions of the act have a natural connection with the subject expressed in the title, is in conformity with the requirements of section 51, of the Constitution.
2. **Statutes—Enactment, Requisites and Validity in General.**—Bills for raising revenue, as mentioned in section 47, of the Constitution, are bills for the levying of taxes, in the strict sense, and a statute, the requirement of which may incidentally cause the collection of revenue, is not void, because it has its origin in the senate.
3. **Taxation—Equality and Uniformity.**—The uniformity in taxation required by section 171 of the Constitution means that the taxes levied must be uniform and equal upon the taxable property of the unit of taxation, in which the taxes may be lawfully levied.
4. **Reformatories—Maintenance of Houses of Reform by Counties.**—Under section 252 of the Constitution, the legislature is within its authority to require each of the counties of the state to maintain the inmates of the house of reform, who may be sentenced to confinement there from the county.
5. **Criminal Law—Inmates of House of Reform.**—Section 254 of the Constitution does not apply to inmates of the house of reform, but to persons convicted of felonies, under the regular admin-

istration of the criminal laws of the state, and sentenced to confinement at hard labor in the penitentiaries.

6. Courts—County Courts Without Jurisdiction in Felony Cases.—The county courts of the respective counties of the state, have no jurisdiction to try or convict any one of a felony or misdemeanor.
7. Infants—Juvenile Delinquents.—The offense designated by law of which a county court may convict a male child seventeen years of age or under, or a female child eighteen years of age or under, is that of being a delinquent as described by Section 331e, subsection 1, Kentucky Statutes, and such child the county court may in its discretion sentence to confinement in the house of reform.
8. Infants—Juvenile Delinquents.—The child which may be indicted upon a charge of guilt of a felony, as mentioned in chapter 26, Session Acts, 1914, is one, who on account of its offenses, and characteristics, when, having been brought before the county court, the latter court has in its discretion transferred to the circuit court to be proceeded against in accordance, with the administration of the criminal laws of the state, and who, if convicted of a felony, will be sentenced by the circuit court.
9. Reformatories—Juvenile Delinquents.—The inmates of the house of reform, whose maintenance to the extent of \$100.00 per year, the counties are required to provide, are the children over ten years of age and under sixteen years of age, and who have not been transferred to other proper courts, by the county courts, to be proceeded against under the general criminal laws of the state, but, who are convicted of being delinquents, by the county courts, and sentenced to confinement in the house of reform.

W. V. EATON for appellant.

CHARLES H. MORRIS, Ex-Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

An act of the General Assembly, which was approved March 17, 1914, is as follows:

“An act to further regulate the admission of inmates to the House of Reform.

“Be it enacted by the general assembly of the Commonwealth of Kentucky:

“1. No child under the age of ten years shall be sentenced to or confined in the school of reform, or any state penal institution.

“2. When any child over ten years of age and under sixteen years of age shall be sentenced to, and confined in, the house of reform, the expense of conveying said child to the house of reform shall be paid by the county

from which sent, and said county shall pay for the maintenance of such child \$100.00, annually, which sum shall be payable into the state treasury, in monthly installments, at the end of each month. It shall be the duty of the county judge on the last day of each month, by written order, to direct the treasurer of the county, or the person acting as treasurer, to forward to the auditor of public accounts the amount due, under the provisions of the act. If any county shall make default in payment of any sum due under the provisions of this act, the auditor may institute suit against such county for the recovery of the amount due in the Franklin circuit court. The provisions of this section shall not apply when the child so sentenced has been indicted upon a felony charge.

“All laws and parts of laws in conflict with this act are hereby repealed.”

After the enactment of the foregoing statute, a considerable number of children between the ages of ten and sixteen years, and who had not been indicted upon any felony charge, were sentenced to and confined in the House of Reform by the county court of the county of McCracken, but, the judge of that court refused to make any order directing the treasurer of the county, or the person acting as treasurer, to forward to the Auditor of Public Accounts, at the end of each month, the amount due under the provisions of the statute for the maintenance of such children. On the 16th day of November, 1918, this action was instituted by the Commonwealth of Kentucky upon the relation of the then Auditor of Public Accounts against the judge of the county court of McCracken county to require him to make a written order directing the sum then due, under the act from the county, to be paid by the treasurer and transmitted to the Auditor of Public Accounts. The county judge resisted the relief sought, upon the grounds, hereinafter considered, but, the action resulted in a judgment which sustained a demurrer to the statement of each of the grounds of defense relied upon, and the appellant declining to further plead, a judgment was rendered granting the entire relief sought in the petition. From that judgment, the present appeal has been prosecuted.

The action by the Commonwealth of Kentucky upon the relation of the Auditor of Public Accounts, is entirely predicated upon the provisions of the above quoted enactment of the General Assembly, but, its validity is

assailed upon several grounds, either of which, it is claimed, renders it void, because in contravention of the provisions of the Constitution. It is insisted that the statute is in violation of the Constitution and void, for the following reasons:

(1) The second section of the act is in violation of section 51.

(2) The second section of the act violates section 47 of the Constitution, in that it is a statute for raising revenue, and had its origin in the senate, instead of in the house of representatives.

(3) The second section of the act violates section 171, of the Constitution, which requires uniformity and equality, in taxation.

(4) The act violates section 254, of the Constitution by the terms of which the Commonwealth is required to provide all supplies for convicts.

The objections to the statute, based upon its constitutional invalidity will be first considered, because if the act is void, for being in violation of any constitutional provision, the action must be determined for appellant, without further question.

(a) The contention, that the General Assembly failed to observe the requirements of section 51, of the Constitution in the enactment of the statute, is not tenable. That section of the Constitution provides, as follows: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length." It will be observed, that the act, under consideration, is not an amendment of any other statute, nor does it pretend to amend, revise, extend or confer the provisions of any other statute by reference to the title of such statute only, and hence the second inhibition in the section of the Constitution, *supra*, can have no application to this statute. It is, however, insisted that the subject matter dealt with in the second section of the act is not germane to the subject expressed in the title, and is foreign to it, and for such reason, it violates the constitutional provision, wherein it is required, that a law enacted by the General Assembly shall not relate to more than one subject and that must be expressed in the title. It will be observed, that the subject of the

legislation expressed in the title, is the further regulation of the admission of inmates to the House of Reform. The first section of the act is a regulation of admission to the extent, that it prohibits admission of any child, who is under the age of ten years. The second section regulates the admission of children, who may be sentenced to the House of Reform, and who are over ten years and under sixteen years of age, and who have been sentenced to confinement in the House of Reform, without having been indicted for a felony, and therefore have not been convicted of a felony, in the regular administration of the criminal laws of the Commonwealth. The provisions of the second section of the act further regulate the admission of children over ten and under sixteen years of age, who are sentenced to confinement in the House of Reform, by providing, that the county from which such child is sent shall defray the expenses of conveying the child to the House of Reform, and shall pay \$100.00 yearly, for its maintenance, and then it provides the time, when and the manner in which such sum for maintenance shall be paid into the state treasury, and imposed the duty upon the Auditor of Public Accounts to sue, if necessary, if the officials of the county fail to perform the duties required of them in paying into the treasury, the sum required by the statute. A statute can have only one subject, and that must be expressed in the title, but, the enactment which follows may contain any provision, which is germane to the subject expressed in the title—that is, to say, that is naturally connected with the subject, and not foreign to it. *Williams v. Wedding*, 165 Ky. 361; *Com. v. Starr*, 160 Ky. 260; *Mark v. Bloom*, 141 Ky. 474; *McGlone v. Womack*, 129 Ky. 274; *Nunn v. Bank*, 107 Ky. 262; *Burnsides v. Lincoln Co. Ct.*, 86 Ky. 423; *Conley v. Com.*, 98 Ky. 125; *Live Stock, etc. v. Hager*, 120 Ky. 125. The provisions complained of in the statute seem to fall within the limitations of the above stated rule.

(b) It is conceded that the act, under consideration originated in the senate, and hence, it is insisted that the section of it, which requires the county from which an inmate who is over ten and under sixteen years of age, and who has not been indicted for a felony, is sent, to pay \$100.00 per year for the maintenance of such inmate, and the county judge at the end of each month to make an order upon the treasurer of the county, to forward to the Auditor of Public Accounts, the amount due,

is void, because in violation of section 47, of the Constitution, which provides, that "All bills for raising revenue shall originate in the house of representatives, etc. . . ." This section of the Constitution is in the constitution of the United States, and in some form or other in the constitution of nearly every state, and was borrowed from the British Constitution originally, where the reason for its adoption, also, originated, but, that reason is not very impressive in this country at the present time, as all the members of both the upper and lower houses of legislatures are elected by the people and answerable to them, but, whatever the reason for retention in our Constitution, its enforcement is incumbent upon the courts. It has received very little judicial consideration, but so far as that consideration has gone, the term "bills for raising revenue," to which reference is made in section 47, *supra*, is confined in meaning to such bills as are for the levying of taxes, in the strict sense of the word tax—bills which on their face are plainly designed to raise a revenue, and its meaning has not been allowed to extend to bills for other purposes, which may indirectly create a revenue. *Northern Counties, etc. v. Sears*, 30 Ore. 388; *Perry Co. v. Selma, et al.*, 58 Ala. 546; *U. S. v. Mayor*, 1 Gall. 397; *Thierman v. Com.*, 123 Ky. 740; *Com. v. Bailey*, 81 Ky. 395, 25 R. C. L. 878. That the statute in question does not impose directly any tax, is evident, though it may, incidentally make it necessary for the county authorities to levy taxes, to meet the requirements of the law.

(c) It is insisted, that the second section of the act imposes double taxes, or at least imposes a burden of taxation which is unequal, as between the different counties of the Commonwealth, and therefore violates the uniformity and equality in the laying of taxes, which are guaranteed by section 171 of the Constitution. In support of this contention, the argument is advanced, that the taxable property of the county of McCracken has imposed upon it the same rate of taxation, as the property, in the other counties of the state for the support of the penal institutions of the state, including the House of Reform, and that in addition thereto, to impose upon the property of the county, an additional burden, in the way of maintenance of the class of persons designated in the act, destroys that equality in taxation, provided by the constitutional provisions, *supra*. That the burdens of taxation must be uniform, and to be uniform

must have the essential of equality, and must bear alike, upon all the property within the limits of the unit wherein it is lawful to levy taxes for a purpose, there can be no doubt, whether that unit be the state, county or a municipality. *Eminence Distillery Co. v. Henry Co., etc.*, 178 Ky. 811; *Spalding, Tax Collector v. Hill*, 86 Ky. 656; *Hager v. Walker*, 128 Ky. 1. Can the requirements of the act, however work a taxation of the property, twice for the same purpose? The costs of the erection and maintenance of the House of Reform, and for the maintenance of all the inmates therein, who are above the age of sixteen years, and of all those under that age who have been indicted for felonies and suffered conviction under the regular mode of administration of the criminal laws, are borne by the Commonwealth and satisfied out of the revenues of the state, which are collected from assessments made upon all the taxable property within the state, and which are borne equally by the citizens irrespective of the counties, in which they reside or are taxed. The maintenance of the inmates, who are between ten and sixteen years of age, and who have not been convicted under indictments for felonies, to the extent of \$100.00 per year, while detained, there, is, if paid into the treasury, by the counties as required by the act, paid by the counties through the medium of the state authorities but, the state exacts the cost for the maintenance of the latter class of inmates, to the extent that is provided by the act, but once, and hence, there is no taxation of the same property twice for the same purpose in any county of the state, as the other taxes levied and collected are not applied to such purpose. In the absence of any constitutional restriction, it is within the power of the legislature to require each county to maintain the inmates of the House of Reform, which its authorities sentence to confinement in such institution. In that state of case, the county for such purpose would constitute the unit of taxation for the maintenance of such of its citizens, as its authorities might consign to confinement there. If necessary to levy taxes for such purpose, it would be incumbent upon the taxing authorities of the county, to levy a uniform and equal taxation upon the taxable property within the county. *Lexington v. McQuillan's Heirs*, 9 Dana 513. There could be no discrimination between the counties, as each would bear a burden in proportion to the benefits it would receive from the correction and training of its citizens.

(d) It is, contended however, that sections 252 and 254, of the Constitution require the inmates of the House of Reform to be maintained by the Commonwealth, and hence the unit for taxation for that purpose would be the entire state, and the General Assembly is without power to require a county to maintain an inmate in such institution, because he was sentenced thereto from such county. Section 252, *supra*, is as follows: "It shall be the duty of the general assembly to provide by law as soon as practicable, for the establishment and maintenance of an institution or institutions for the detention, correction, instruction and reformation of all persons under the age of eighteen years, convicted of such felonies and such misdemeanors, as may be designated by law. Said institution shall be known as the House of Reform." It will be observed, that this section of the Constitution does not provide, in what manner the general assembly shall make provision for the maintenance of the inmates. It is left to the discretion of the legislature to adopt any constitutional method, it may select, for the maintenance of the inmates of such institution, and to provide the necessary funds for that purpose. Hence the statute, under consideration, so far as it requires a county from which the inmate is sent to contribute to his maintenance or rather to reimburse the state for so doing, does not conflict with the constitutional provision. It is contended, however, that section 254 of the Constitution requires the state to assume the entire burden of the maintenance of the inmates, of the House of Reform, and for such reason the legislature can not place any part of it upon a county. Section 254, is as follows: "The Commonwealth shall maintain control of the discipline and provide for all supplies, and for the sanitary condition of the convicts, and the labor only of convicts may be leased." The latter section of the Constitution immediately follows section 253, which deals altogether with persons, who are convicted of felonies and sentenced to confinement in the penitentiaries, and provides for their confinement at labor within the walls of the penitentiaries, and under what circumstances such persons may be kept without the walls of the penitentiaries. We are of the opinion that section 254, *supra*, has no reference and is not to be applied, to the inmates of the House of Reform, but, applies to the persons convicted of felonies and sentenced to confinement in the penitentiary, as provided by section

253, *supra*, which in point of sequence was placed just preceding section 254, by the Constitution makers. A further reason is that section 252, makes provision for the maintenance of the inmates of the house of reform, by requiring that the general assembly "shall provide by law, for the establishment and maintenance of the House of Reform," and if section 254 had application to it, there would be two sections of the Constitution dealing with the same subject—the maintenance of the inmates of the House of Reform. Although section 253 dealt with the inmates of the penitentiary, it did not make any provision for their maintenance, and section 254 was necessary for that purpose, and unnecessary so far as concerned section 252.

The inmates of the House of Reform, for reimbursement for the maintenance of whom, this action was instituted were each of them found to be guilty of a felony or misdemeanor, by the county court sitting in its juvenile session, and the contention is made, that because of that fact, they were "convicted of such felonies and of such misdemeanors as may be designated by law," in the sense in which those terms are used in section 252 of the Constitution, and for that reason, the county can not be required to reimburse the state for their maintenance. The statute, however, requires the county to contribute to the extent of \$100.00 per year, for the maintenance of such inmates as were not indicted for the commission of felonies, and that sum is all that is here sought. Nor can the county be relieved, because of those adjudged by the county court to be felons, as will hereafter be shown. The legislation required and permitted by section 252, *supra*, has made the purpose of the legislature somewhat confusing, but, by legislation, which was within its authority, it has designated the offense of being a "delinquent" child as the only offense, on account of which the county court, in its juvenile session, may sentence one to confinement in the House of Reform.

By section 331e, Kentucky Statutes, the legislature defined what should constitute a "delinquent child." One of the things which would make a "delinquent" was the violation of any law of this state. The section, also sets out many other things, chiefly sins of commission which would make a child who is guilty of them a "delinquent." Exclusive jurisdiction to deal with delinquent children was vested in the county court. Section 331e, sub-

sec. 2: *Walter v. Com.*, 171 Ky. 457; *Com. v. Davis*, 169 Ky. 681; *Talbott v. Com.*, 166 Ky. 659; *Mattingly v. Com.*, 171 Ky. 222. Before the county court, a child charged with being a "delinquent" may be tried to determine his or her guilt of any of the acts, which constitute the delinquency. The county court may do so, without a jury, or if a jury is demanded it may empanel one to determine whether the facts exist, which make the child a delinquent. When a proper charge is made, evidence may be offered which proves the child to be guilty of a felony or misdemeanor, but, not for the purpose of convicting the child of such felony or misdemeanor, but, as evidence proving its delinquency. When a delinquent child is brought before the county court, if in its discretion, the offenses of the child are such, that the court is of the opinion, that it should be "proceeded against in accordance with the laws governing the commission of crimes," it shall dismiss the proceedings against it as a delinquent, and transfer it to the court which has jurisdiction of the crime or misdemeanor. Section 331e, subsection 5. Without action of this kind on the part of the county court, no other court has jurisdiction to hear or determine a charge of a felony or misdemeanor against any male child, seventeen years of age or under, nor against any female child, eighteen years of age or under. But, when jurisdiction is thus acquired by the proper court, it may proceed to deal with the child, in accordance with the criminal laws of the country. If transferred to a circuit court, upon a felony charge, the child may be indicted, and if convicted upon such charge, and sentenced to the House of Reform, under the law provided by the General Assembly, the state bears the costs of his or her maintenance. If the county court proceeds against a child before it, on the charge of delinquency, and such is established, the power of the court is controlled and governed by subsection 7, of section 331e, Kentucky Statutes, and the subsections of that section pertaining to delinquent children, and one of the things which the court may do, in its discretion, is to sentence the child to confinement in the House of Reform, and it is such children sentenced for delinquency to the House of Reform, that the act under consideration requires the county from which he or she is sent, to contribute to his or her maintenance. The act provides, that the county can not be required to maintain an inmate of the House of Reform, who has been indicted for

a felony. A delinquent child, could not be legally indicted for a felony, except when he has been transferred from the county court to the circuit court, for trial upon a charge of felony and then, if convicted, the child is sentenced by the circuit court and not the county court. The county court has no jurisdiction to convict any one of a felony or misdemeanor, and the judgments in the instant case, were, in effect judgments finding the children to be delinquents and sentencing them to confinement in the House of Reform.

(e) A further contention is made, that the Auditor has no authority to maintain the present action, as the statute only authorizes him to sue a county and not a county judge. The statute, however, makes it the duty of the county judge on the last day of each month to make an order directing the treasurer of the county, or one acting as such, to transmit to the Auditor the sum due, and as the duty is imposed upon the Auditor of Public Accounts to receive and account for the sum for the Commonwealth, we think he is authorized to maintain an action in the name of the Commonwealth requiring the orders to be made which are necessary to enable the state by the Auditor to proceed against a county. The power of the county judge to make the orders allowing the sums due is vested in him by the statute, which also, makes it his duty to make the orders. Until the orders are made, the county would not be delinquent in paying.

The judgment appealed from is therefore affirmed.

Commonwealth v. Louisville & Interurban Railway Company.

(Decided December 14, 1920.)

Appeal from Oldham Circuit Court.

1. Railroads—Water Closets—Locks.—It is just as necessary for a railroad company to furnish its patrons with the means of entering a water closet as it is to furnish the water closet itself; and though it may keep the closet locked it should see that the keys are accessible. To that end it may leave the keys with the agent when there, but when he is not there, the keys should be left in an exposed place where they may be readily seen and obtained by patrons having occasion to use the closet.
2. Railroads—Water Closets—Criminal Prosecution—Extent of Proof—Question for Jury.—To authorize the submission of the

case to the jury, it is necessary in a criminal prosecution under section 772, Kentucky Statutes, to show to the exclusion of a reasonable doubt that a water closet otherwise suitable and convenient was kept locked and that the keys thereto were not accessible to the patrons.

3. Railroads—Water Closets—Criminal Prosecution—Question for Jury—Sufficiency of Evidence That Keys to Water Closet Were Not Accessible.—In prosecution under 772, Kentucky Statutes, evidence that the keys were inaccessible to patrons held insufficient to take case to the jury.

CHARLES I. DAWSON, Attorney General, CHARLES H. MORRIS, Ex-Attorney General, C. H. SANFORD and J. BALLARD CLARK for appellant.

WILLIS, TODD & BOND for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

The Louisville and Interurban Railway Company was indicted under section 772, Kentucky Statutes, for the offense of failing to maintain at its station in LaGrange a suitable and convenient water closet.

A trial before a jury resulted in the imposition of a fine of \$100.00. On appeal the court held that the water closet was suitable and convenient and that the evidence as to when the closet was locked and of the inaccessibility to the patrons of the keys thereto was insufficient to take the case to the jury, and reversed the judgment with directions for a peremptory if the evidence on another trial was substantially the same. *Louisville & Interurban Ry. Co. v. Commonwealth*, 180 Ky. 843, 203 S. W. 717. At the conclusion of the evidence for the Commonwealth on the second trial, the court directed a verdict in favor of the company, and the Commonwealth appeals.

It was shown on the last trial that the company ran its cars every hour until after midnight, and that the agent left the station at six o'clock p. m. After that time the compartment for men was unlocked, but the compartment for women was locked. Dr. Connell testified that on one occasion covered by the indictment he asked the agent for the key, and the agent reached around on the wall and got it, and this occurred inside the station. Judge Morris, another witness, testified that the company did not have the key where it could be seen, but a question by the court elicited the information that the witness

had never had occasion to ascertain where the key was prior to the return of the indictment.

It is just as necessary for a railroad company to furnish its patrons with the means of entering the water closet as it is to furnish the water closet itself. Hence though the company has the right to keep the closet locked it should see that the keys thereto are accessible, and to that end, it may leave the keys with the agent when he is there, but when he is not there, the keys should be put in an exposed place so that they may be readily seen and obtained by those patrons having occasion to use the closet.

In order to authorize the submission of the case to the jury, it was necessary for the Commonwealth to show to the exclusion of a reasonable doubt not only that the closet in question was kept locked but that the keys were not accessible to the patrons as above set out. The evidence of Dr. Connell shows that on the occasion he needed the key, it was furnished to him by the agent. That being true, his evidence did not show that the key was inaccessible. The statement of Judge Morris that the company did not have the key where it could be seen in the absence of the agent, would have been sufficient to take the case to the jury if it had also been shown that his evidence related to the time covered by the indictment, but clearly it was not sufficient for that purpose when it was made to appear that it related to another time.

It follows that the court did not err in directing a verdict of acquittal.

Judgment affirmed.

Imperial Elkhorn Coal Company v. Webb, et al.

(Decided December 17, 1920.)

Appeal from Letcher Circuit Court.

1. **Injunction—Restraint Upon Completion of Building.**—The owner of the surface of the property will not be enjoined at the instance of a coal company from the erection of a building where the coal company only owns the mineral rights in the property unless such restraint is necessary in the operation of its mines,
2. **Injunction—What Mining Privileges Include.**—Mining privileges include the right to go upon the land and operate for coal, take out and sell the product, and do all the things reasonably incident to that work.

3. **Injunction—Enjoyment of Surface Owner of Mineral Lands.**—The surface owner has the right to enjoy the lands free from annoyance, except such as reasonably arises from the opening, exploration, mining and marketing of the minerals granted.

D. D. FIELDS & DAY for plaintiff.

DAVID HAYS, CHARLES H. MORRIS and J. C. JONES for defendants.

OPINION BY JUDGE SAMPSON—Overruling motion to grant injunction.

Webb and Franklin own the surface of the land in which the Imperial Elkhorn Coal Co. and its grantors own the coal and certain other minerals under and by a deed made in 1887, and which deed recites that the grantee of the coal and mineral shall have "all the usual mining privileges and timber necessary for mining purposes, reserving to ourselves the fee simple to the surface of said farm." On adjoining coal property the coal company has heretofore installed a coal mining plant with tippie, railroad switch and a large number of residences for the occupancy of the men employed by it as miners of coal.

A few months before the commencement of this action defendant Webb sold to his co-defendant Franklin a lot 50x40 feet from the surface of the property in controversy, being a part of the same land from which Webb or his predecessors in title had sold the mineral by the deed above mentioned, and Franklin proceeded to erect a store house on the lot in which to carry a line of merchandise and keep the postoffice. Immediately upon learning this the coal company protested to Franklin against the erection of the store, and when he failed to desist from the work instituted this action to obtain a temporary restraining order preventing Franklin from completing the building. Franklin and Webb moved the judge of the Letcher circuit court to set aside the order granting the restraining order and upon hearing this motion was sustained, and at the same time the motion of the coal company for a permanent injunction was denied, and the company has entered a motion before me as a judge of the Kentucky Court of Appeals to grant the injunction refused by the circuit judge. Without passing upon the preliminary question as to whether such a motion is here tenable, we must deny the relief sought by the company upon the merits of the controversy, for obvious reasons.

The coal company does not own the surface of the land, and cannot use or occupy it except in a reasonably necessary way in mining and removing the mineral granted by the deed under which it claims.

By the term "all the usual mining privileges" used in the deed the coal company has and may enjoy the right to go on the land and explore for, open and operate coal or other mines, take out and sell the product, and do all the things reasonably incident to that work. The erection and maintenance of a tippie, railroad and mining camp is a necessary part of this work and may be held to have been in the contemplation of the parties making the deed granting "all the usual mining privileges," but the mining company must not take or appropriate to its use the surface of the lands unnecessarily to the injury or annoyance of the owner of the surface.

The surface owner has the right to enjoy the lands free from annoyance, except such as reasonably arises from the opening, exploration, mining and marketing of the minerals granted. The corresponding rights of the owner of the surface and the owner of the mineral—two estates—is stated in 27 Cyc., page 688, as follows:

"The owner of mineral has of course the right to remove the same, and a grant or reservation of minerals carries with it as incidents a right to open a mine by sinking shafts, and the right to use such lands as are necessary in getting out and removing the minerals, and generally to employ all the necessary appliances requisite to the proper working of the mines. But the surface rights are limited to so much of the surface and such uses thereof as are reasonably necessary to properly get at and carry away the minerals, and in the absence of an express grant or license, the mineral owner has no right to use appliances and facilities belonging to the surface owner even though such use will cause the latter no inconvenience. What improvements are reasonably necessary for the proper working of a mine, and to what extent the surface may be occupied for that purpose are questions for the jury. Where specified surface rights are expressly granted or reserved in connection with the mineral rights, the intention of the parties and the general rules of construction govern in determining the extent of the mineral owners' rights."

The evidence in this case shows that no building or other improvements of consequence had been erected or attempted by the coal company on the 205 acres in ques-

tion up to the time of the commencement of these proceedings; that Franklin only intended to erect one rather small house, and this not in the proposed railroad right of way or near a tippie or coal opening; that there was plenty of room in the level five acre tract, outside the 50x40 foot lot owned by Franklin and on which he was building, to place all the houses and other improvements necessary or contemplated for the development, operation, mining and marketing of the coal and other minerals from the Webb premises. As Franklin and Webb had and have the right to use the surface of the land in any lawful way which does not materially interfere with the mining business of the company owning and operating the minerals, and it does not appear from the record that the building of the house would do so, the company was not entitled to the restraining order in the first instance and is not now entitled to injunctive relief against either Webb or Franklin.

The motion to reinstate the restraining order is overruled.

The whole court sat with me in the consideration of this motion and concur in the conclusion reached.

Hunter v. Wood.

(Decided December 17, 1920.)

Appeal from Muhlenberg Circuit Court.

1. Appeal and Error—Breach of Contract to Sell Lumber—Evidence.—Evidence examined in suit by purchaser against seller for breach of contract to sell lumber and held that plaintiff made out his case and the court erred in directing a verdict for defendant.
2. Damages—Anticipated Profits—Special Damages.—Anticipated profits are recoverable as special damages for breach of contract for sale of lumber where it is pleaded and proven that same were in contemplation of the parties when the contract was executed.

HUBERT MERIDITH and WALKER WILKINS for appellant.

TAYLOR, EAVES & SPARKS for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

In July, 1917, the defendant, now appellee, S. A. Wood, by written contract sold and agreed to deliver to

plaintiff, R. W. Hunter, at specified prices all of the lumber that could be sawed by Vaughn and McIntyre before July 1, 1918, from one hundred acres of described land owned by Wood. Hunter was to specify how he wanted the timber sawed and furnish a man at the mill to inspect same, and he was to take up and pay for the quantity delivered every two weeks. Wood had previously contracted with Vaughn and McIntyre, who owned a portable saw mill, to work up the timber on this tract of land for him.

Hunter furnished a man at the mill as agreed, for seven consecutive weeks after the contract became effective, to inspect the lumber as sawed and Vaughn and McIntyre were ready, willing and able to saw same but Wood refused to cut the trees and deliver same at the mill as he had agreed to do. For some weeks, Wood put the parties off with excuses and promises to perform his part of the two contracts but finally refused outright to do so. Thereafter Hunter filed this action to recover damages for the breach of his contract, alleging in the petition the contract, the breach of same by the defendant and that he, the plaintiff, had been at all times ready, willing and able to perform his part thereof; that there was located upon the land as much as two million feet of lumber of the kinds and grades set out in the contract that could have been sawed and delivered to him during the life of the contract; and that "this plaintiff bought all of said timber of defendant to be manufactured into lumber or lumber and logs as aforesaid, for the purpose of making immediate sale thereof to his customers and to others with whom he then had contracts in contemplation for the sale of said lumber and logs, all of which this plaintiff made known to defendant at the time of entering into said contract with him as aforesaid; that said lumber or lumber and logs were worth in the market the very highest and best market prices and this plaintiff could and did have the same sold at certain agreed and market prices which would have made and brought to him a profit of as much as \$20,000.00."

The defendant by answer admitted the execution of the contract but traversed the other material allegations of the petition. In a separate paragraph he alleged by way of counterclaim against plaintiff that, "he did not furnish any orders whatever for lumber; that the man furnished by him to grade the same did grade about thirty thousand feet and accepted it as coming within

the requirements of said contract, but that plaintiff failed and refused and still fails and refuses to receive said lumber or pay this defendant anything whatever therefor, to this defendant's damage in the sum of \$3,000.00."

He also pleaded the alleged prior breach by plaintiff as a release of him from any obligations whatever thereunder.

The affirmative allegations of the answer were traversed by reply. Upon the trial at the conclusion of the evidence for plaintiff, a motion by defendant for a directed verdict in his behalf was sustained by the court; the jury returned a verdict in accordance therewith and from the judgment which followed dismissing his petition, the plaintiff appeals.

1. The chief ground upon which counsel for defendant attempt to sustain the directed verdict was the failure of plaintiff to introduce any evidence with reference to the following provision in the contract:

"In case the said Wood prefers selling his big logs in the log, instead of the lumber, the said Hunter agrees to pay him the following prices for same delivered on the bank of Green river, same being a part of contract for timber in above described boundary."

It is insisted that since the defendant had the option to furnish logs instead of lumber proof of his failure to furnish the latter simply was insufficient to show a breach of the contract by defendant. This contention however is wholly without merit since the defendant by his answer defended upon the ground that he had been released from his obligations under the contract by a prior breach of the plaintiff and did not assert that he had offered to deliver logs instead of lumber under his option so to do as in our judgment under the circumstances he must have done before he could rely upon this provision of the contract as a defense for his proven failure to furnish the lumber according to the specifications furnished by the plaintiff as in the contract provided. The contract is essentially one for the delivery of lumber at specified prices to be sawed from maple, elm, hard and soft maple, gum, beech and red and white oak timber, whereas the option given to the defendant to supply logs instead of lumber refers only to red and white oak timber and only the big logs of such timber, as is evident from the fact that prices are named for

only such logs immediately following the optional provision quoted above.

Defendant did not therefore have an absolute option to furnish the lumber or logs, but only a qualified option to furnish logs instead of lumber from a part of the timber covered by the contract.

In order to avail himself of this privilege, it was his duty to have tendered the logs and after he did this he could have pleaded same as *pro tanto* defense; and he could have offered proof thereof under his general denial of damages to prove the true extent of same, but it was not incumbent upon plaintiff in order to make out his case to offer any proof upon this subject whatever.

2. It is also contended that the peremptory instruction was proper because of plaintiff's failure to prove what it would have cost him to load the lumber from the banks of Green river where defendant was to deliver it on boats in the river where plaintiff was to deliver it under contracts by which he had resold same at a very much larger price than he had agreed to pay defendant. It is contended that because of the absence of this proof there was no proof of facts from which plaintiff's profits could have been calculated.

Plaintiff introduced his contract with the defendant to show what the lumber would have cost him and he then introduced a contract under which he had resold same at higher prices and testified without objection that his profits upon the resale would have been \$10.00 a thousand feet on an average for all of the lumber defendant had contracted to deliver him. He also proved that Vaughn and McIntyre with their mill and under their sawing contract with defendant could easily have sawed all of the timber on the one hundred acres of land within the contract period and that this would have amounted to about two million feet of lumber. It is therefore clear that by plaintiff's evidence he showed a loss of profits amounting to about \$20,000.00 which resulted from defendant's proven failure to comply with the contract sued on.

While it is true that by comparison of plaintiff's contract with defendant with the one under which he made the resale, it would be difficult if not impossible to ascertain his profits without proof of the cost to plaintiff of loading the lumber from the banks of Green river onto boats therein, it is quite an easy matter to calculate those profits from his uncontradicted testimony that his

profits on the resale would have amounted to \$10.00 a thousand feet on two million feet of lumber. If this proof of profits amounting to \$10.00 a thousand feet was erroneous because of the failure to deduct therefrom the costs plaintiff would have been forced to incur in loading the lumber on boats in the river this could and should have been shown by the defendant. A failure upon the part of plaintiff to demonstrate the truth of his testimony as to the amount of his profits obviously can not destroy that testimony.

3. It is further insisted that the profits plaintiff would have made upon the resale are not the criterion of damages he could recover upon a breach of the contract by the defendant and that as no other measure of damages was proven the peremptory instruction was proper.

As a matter of fact, plaintiff did prove the market value of the timber and that it was in excess of the prices he had agreed to pay the defendant for same since he proved the prices at which he had resold the timber and that the prices thus obtained by him were about \$5.00 a thousand feet under the market prices at the time. But even if this were not true, plaintiff made the necessary allegations in his petition and sustained them by proof to enable him to recover lost profits in this case. We have quoted above the allegations of the petition that he purchased the lumber of defendant in contemplation of his contracts of resale and that he informed defendant of this fact at the time he entered into the contract with him. Plaintiff's evidence fully sustained these allegations of the petition.

While ordinarily lost profits are not an element of damages recoverable for the breach of a contract of sale, it is thoroughly established that they are recoverable as special damages under the circumstances alleged and proven by plaintiff in this case that they were within the contemplation of the parties making the contract. See *Pulaski Stave Co., etc. v. Miller's Creek Lumber Co., etc.*, 138 Ky. 372, 128 S. W. 96, and *Pugh v. Jackson, Jr.*, 154 Ky. 649, 157 S. W. 1082; *Asher, et al. v. Howard*, et al. 178 Ky. 398, 198 S. W. 1149.

4. It is finally contended that there was no proof of loss of anticipated profits because plaintiff's contract of resale of the lumber to Maley and Wertz of Evansville, Indiana, which was in the shape of a letter to plaintiff, contained the stipulation that "your failure to have

shipment ready and guarantee continuance after sixty days from date, will forfeit this contract, otherwise to remain in full force for a term of twelve months or during the manufacture of said Wood tract."

And also because it was stated at the close of the letter "We await your confirmation of this contract." It is insisted that this latter statement shows that the letter was merely an offer and not a contract. But counsel have overlooked the fact that both the plaintiff and Mr. Bauman, general manager of Maley and Wertz with whom the contract was made, testified that plaintiff accepted and confirmed the contract within a few days after the letter was received by him. And it is insisted that the stipulation in the contract that "your failure to have shipment ready and guarantee continuance after sixty days from date will forfeit this contract," forced the plaintiff upon penalty of forfeiture to deliver all of the lumber he was to get from defendant within sixty days after the date of the Maley and Wertz contract, and that since defendant had a whole year within which to complete his contract with plaintiff, it would have been impossible for the latter to make the delivery. This however is not true. Plaintiff did not have to make complete delivery to Maley and Wertz within sixty days but was only required to have a shipment ready and guarantee continuance within sixty days from the date of his contract with Maley and Wertz or by September 9, 1917. This he could easily have done had defendant complied with his contract.

For reasons indicated the judgment is reversed and the cause remanded for a new trial consistent herewith.

Walter v. Walter.

(Decided December 17, 1920.)

Appeal from Boyd Circuit Court.

1. Divorce—Review of Alimony.—This court is without power to reverse a judgment of divorce, but the evidence upon that question will be reviewed when necessary to determine the question of alimony of which we have revisionary control.
2. Divorce—Duty of Husband to Provide Home.—It is both the right and the duty of the husband to provide a home for himself and wife; and, when reasonably exercised to decide where it shall be

located, but he cannot exercise the right of choice of location and impose upon the wife the duty of providing a suitable home at the place of his choice when he is amply able to do so.

3. Divorce—Duty of Husband to Provide Home.—The wife does not have to sell her home left her by a former husband in one place and with the proceeds purchase a new home in another place where the husband reasonably elects to reside; and where he leaves her and lives apart from her for one year because she will not do so and does not provide or offer to provide her a home where he elects to reside with his own means although amply able to do so, the court did not err in granting her a divorce and alimony.
4. Divorce—Alimony.—An allowance to the wife of \$100.00 a month alimony was not excessive upon the evidence in this case.
5. Divorce—Attorneys' Fees.—An allowance of \$500.00 to attorneys for the wife was not excessive and was properly allowed as costs against the husband, since under our statutes the husband is required to pay same unless the wife is both in fault and has ample means of her own, and the wife here was not in fault.
6. Divorce—Attorneys' Fees.—The complaint of the wife that the allowances to her and her attorneys are too small cannot be considered since she has not prosecuted a cross appeal.

BENTON & DAVIS and J. F. COLDIRON for appellant.

GEORGE B. MARTIN and J. F. STEWART for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

In this action for divorce, the petition of the husband was dismissed and the wife upon her counterclaim was granted a divorce and alimony and her attorneys were allowed \$500.00 for their services. The husband appeals.

The ground upon which a divorce was asked by each was one year's abandonment by the other, and while we have no power to reverse the judgment of divorce refused the husband and granted the wife, the wife's right to alimony depends upon and can be sustained only if her husband abandoned her and she was entitled to the divorce. Hence it will be necessary to review the evidence upon that question.

The parties were married on December 14, 1914. It was the second venture for each. At the time Mrs. Walter, with her single daughter, was living in Ashland, Kentucky, in a residence that had been devised to her by her first husband and which was worth about \$25,000.00. She also owned a cottage in the same city worth about \$2,500 and \$8,000.00 worth of stock in a

building and loan association, also willed to her by her former husband. Mr. Walter was a resident of Clarke county and a successful farmer. He owned several large farms and was worth at least \$50,000.00 above all indebtedness. There had been some discussion between them previous to their marriage as to whether they would live in Ashland where the wife then resided or in Winchester where the husband resided, but owned no suitable home. This question was not decided, however, each party expressing a willingness to live at any place with the other, but the husband expressed the hope that the wife would be willing to live in or near Winchester where his business interests were. After the marriage the husband with his ten year old son moved into the wife's home in Ashland, put his son in school in that city and resided there with her and her single daughter until in May, 1916, when he left her and did not return. During the time he lived with his wife plaintiff contributed only about \$55.00 a month toward the family expenses, which amounted to at least \$250.00 a month, and when he left he did not inform his wife that he did not intend to return but was leaving her finally.

After the expiration of a year he instituted this action for divorce and contends that she abandoned him because she refused to go with him to Winchester where he desired and elected to establish their residence. That it is both the right and the duty of the husband to provide for his wife a home cannot be doubted, and it is equally clear that in so doing the place where it is to be established must be left to his choice, when reasonably exercised, since otherwise the power to provide a home would be interfered with unreasonably and often destroyed; but he cannot exercise the right of choice and avoid the duty of furnishing a suitable home at the place of his choice, at his own expense when as here he is amply able to do so.

While the evidence is conclusive that plaintiff desired and quite reasonably decided that their home should be in Winchester rather than in Ashland, it is just as conclusively established that he did not provide a suitable home for his wife in Winchester or even offer to do so with his own means, but insisted that his wife should sell the home that had been left her by her first husband in Ashland and with the proceeds of same purchase a home for them in Winchester.

The only proof whatever offered by the husband upon the question is that about a year before the separation he had his wife to visit him at a hotel in Winchester for two days and one night and that upon the second day of this visit when they were being taken on a pleasure drive in an automobile by some friends, several desirable homes in and about Winchester were pointed out to his wife by him or some of their friends and that she did not seem to be interested in any of them or in procuring a home in Winchester, while the husband seemed anxious that the wife should decide to locate in Winchester and that some of the homes shown to her, simply from the automobile as they drove along the road and that may or may not have been for sale, would appeal to her as a suitable place for their home.

This evidence, however, falls far short of showing even a willingness on the part of the husband to provide with his own means, as it was his duty and he was amply able to do, a suitable home for his wife in Winchester. On the other hand it is shown by the testimony for the wife that she was willing to live in Winchester if the husband would provide the home but that she was not willing to sell the home in Ashland which had been left her by her former husband and which it was her desire should eventually go to his children, and with the proceeds of same purchase a home for herself and her husband in Winchester.

We are therefore quite sure that the chancellor did not err in holding that it was the husband who was guilty of the abandonment and not the wife and in awarding the divorce to her; and it is equally clear, in view of the wife's customary mode of living and the husband's ability to pay, that the allowance of \$100.00 a month alimony to the wife was not excessive.

Nor do we think the allowance to her attorneys too large in view of the amount involved and the work performed by them at Ashland and Winchester in the preparation and trial of the case; and since by statute the husband is required to pay attorney's fees for his wife in a divorce proceeding unless she is both at fault and amply able to pay for same, and the wife was not at fault here, it results that the allowance to her attorneys was properly charged against the husband.

Counsel for the wife in their brief complain that both of these allowances are too small, but a cross appeal has not been prosecuted and we could not therefore in-

crease them even if upon the evidence we were of the opinion this ought to be done, which however is not the case.

Wherefore the judgment is affirmed.

Moss Jellico Coal Company v. Jones.

(Decided December 17, 1920.)

Appeal from Whitley Circuit Court.

1. Corporations—Sale of Property By.—A corporation has the same right to sell its property as does a natural person, provided the sale is bona fide and for a valuable consideration paid to the selling corporation as such and with which it may discharge its debts, and when the sale is thus made the purchasing corporation will take the property free from any claims of the creditors of the selling corporation.
2. Corporations—Absorption of Property By Another Corporation—Lien.—If, however, the transaction by which the property is transferred is not in reality a sale in the usual and ordinary way, but consists in an absorption by one corporation of all the property of another or a merger of one into the other, the property being paid for with stock in the purchasing corporation delivered to the stockholders in the selling one or to the corporation for their use and benefit, the creditors of the merged or absorbed corporation will have a lien upon the property transferred and may subject it in the hands of the absorbing corporation, subject, however, to the rights of superior lien holders.

TYE & SILER for appellant.

ROSE & POPE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The Peerless Coal Company, a corporation, owned some coal leasing privileges and was engaged in a small way in coal mining operations. It owned a very limited amount of property and on the 15th day of October, 1915, it executed a written contract to Ray Moss whereby it agreed to sell to him all of its property for the consideration of \$4,000.00, which contract was soon thereafter transferred to appellant and defendant below, Moss Jellico Coal Company, and it took charge of the property purchased and paid the consideration in the manner hereinafter stated. In March, 1916, the ap-

pellee and plaintiff below, I. N. Jones, recovered a judgment against the Peerless Coal Company for \$819.20, interest and cost. An execution issued on that judgment was returned "no property found," and this suit was subsequently filed against the two corporations seeking to subject enough of the property in the hands of appellant, the purchasing corporation, to the satisfaction of plaintiff's debt upon the ground that the Peerless Coal Company was insolvent at the time of the sale and that its property was a trust fund for the payment of its creditors and that appellant in purchasing the property took it burdened with the trust and subject to appropriation by the creditors of the selling corporation. The answer of appellant averred that the sale was one made in good faith, for a valuable consideration and in the usual course of business; that after taking over the property of the Peerless Coal Company it discovered liens existing thereon to the amount of something like \$5,900.00, which it was compelled to and did pay, being of course \$1,900.00 more than the agreed consideration, and that if plaintiff under any theory or principle of the law could subject the purchased property in the possession of appellant to the payment of his debt such right was inferior and must yield to statutory and contractual liens such as appellant was compelled to and did pay, and for that reason the petition should be dismissed. Appropriate pleadings made the issues and upon final hearing the court rendered judgment subjecting the property in the hands of appellant to the payment of plaintiff's debt and ordered enough of it sold for that purpose, and complaining of that judgment appellant prosecutes this appeal.

The general doctrine, which plaintiff seeks to invoke, and upon which he relies in support of his cause of action, will be found stated and discussed in 10 Cyc., pages 1266-1268. As there stated, and as adopted by this court in the cases hereinafter referred to, the doctrine is that a corporation no more than an individual may fraudulently dispose of its property, leaving an insufficient amount for the payment of its debts, without an adequate consideration, and that it is not a sufficient consideration to defeat the right of creditors of the selling corporation when the purchasing corporation paid for the purchased assets with its stock delivered to the stockholders of the selling corporation, or to that corporation to be distributed among its stockholders; that

a purchase thus paid for is nothing more nor less than a merger of the selling corporation by the purchasing one, and that such merger can not be effected without the property in the hands of the latter being subject to the payment of the debts of the former. Cases from this court applying the doctrine are: Louisville & Nashville R. R. Co. v. Biddell, 112 Ky. 494; Harbison-Walker Refractories Co., et al. v. McFarland's Admr., 156 Ky. 44; Martin v. Sulfrage, 159 Ky. 363; Carter Coal Co. v. Clouse, 163 Ky. 337; Justice's Admr. v. Catlettsburg Timber Co., 168 Ky. 665; Kentucky Distilleries & Warehouse Co. v. Webb's Executor, 181 Ky. 90, and American Railway Express Co. v. Commonwealth of Kentucky (decided December 10, 1920). The opinion in the last case cited contains an exhaustive review of the facts in the other cases from this court as well as many others from other jurisdictions, and it would furnish no useful purpose to repeat them here. Suffice it is to say that the court's final conclusion in that opinion, as gathered from a review of all the authorities, upon the question is that:

“Questions concerning the responsibility of the purchasing corporation for the debts and liabilities of the selling corporation have come before the courts of the country in many cases, and it is held practically without dissent that although the purchasing corporation does not assume the payment of any of the debts or liabilities of the selling corporation, it will yet be made responsible for them if there was no consideration for the sale, or if it was not in good faith but for the purpose of defeating the creditors of the selling corporation, or where there has been a merger or consolidation of the corporations, or where the purchasing corporation took over from the stockholders all of the stock of the selling corporation, or where the transaction amounts to a mere reincorporation or reorganization of the selling corporation.”

Further along in that opinion in restating the underlying principles of the doctrine, as well as cases not coming within its operation, it is said:

“A careful consideration of the facts in all these cases and the conclusions of the courts makes it clear that the circumstance that was ultimately seized hold of to make the purchasing corporation liable, was that the selling one was paid for its property in the stock of the purchasing corporation, and the property of the selling

corporation to which the creditors might look with certainty for the payment of their debts was turned over to the purchasing corporation; and cases involving questions like the one we have, disclose the further fact, that when one corporation sells its property and business to another, it is usually the case, that the selling corporation takes its pay in the stock of the purchasing concern.

"But the courts looking through the various forms invented to impart not only validity to the transaction but to save the purchasing corporation from liability for the debts of the selling one, have in almost every case in which the selling corporation received nothing more than stock, held the purchasing corporation liable for the debts of the selling corporation; when, however, money or property of fair value was delivered as the purchase price, the purchasing corporation in the absence of fraud or contract obligation was relieved from liability.

"All the cases also hold that where there is a merger, or consolidation or reincorporation or reorganization and a continuance of the business under a new name the corporation taking over the assets and property of the corporation extinguished for all practical purposes will be liable for its debts, and, as before said, in virtually all this class of cases, the corporation that went out of business was paid for its property in stock of the new corporation."

Applying those principles as thus lately adopted by this court it is perfectly apparent that plaintiff in this case failed to manifest facts entitling him to the benefit of the general doctrine. It is admitted and not denied that the agreed consideration of \$4,000.00 was adequate and it is shown by undisputed evidence that more than that sum was paid by appellant to discharge contractual or statutory liens. There are no elements of a merger of one corporation by another, nor is there any intimation that there was any absorption by appellant of the assets of the Peerless Coal Company leaving the latter with no assets with which to discharge its debts. No stock in the Moss Jellico Coal Company was delivered to the Peerless Coal Company nor to any of its stockholders. It was simply a *bona fide* sale in the usual course of business for a full and adequate consideration and possesses none of the elements of the cases relied on in support of the relief sought and which the court by its judgment gave.

If, however, we should accept as true the broad application of the doctrine insisted on by plaintiff that the purchasing corporation takes the property *in every instance* impressed with a trust in favor of the creditors of the selling corporation regardless of other considerations, plaintiff would not be entitled to relief in this case because, as we have stated, there were liens upon the property more than sufficient to consume it, and this court in the Justice and American Railway Express Company cases, *supra*, said that: "The rule does not operate, however, to disturb sales made in good faith, and for value, or in satisfaction of valid prior liens." To hold otherwise and apply the rule as contended for by plaintiff's counsel would render the property held by the selling corporation subject to its debts in the hands of the purchasing corporation when it would not be so in the hands of the former. Equity does not endorse a rule or principle which would work out such inequitable results; nor does it forbid a *bona fide* sale for a valuable consideration though the contracting parties be corporations. The fact that defendants before consummating the purchase had knowledge of the existence of plaintiff's debt can not enlarge his right nor render property subject to its payment which he could not reach before the sale, especially when, as here, the debt is not a liability secured by a statutory or contractual lien.

Neither can the judgment be upheld on the ground that plaintiff in purchasing the property from the Peerless Coal Company agreed to assume and pay plaintiff's debt. In the first place the suit is not based on any such promise, since there is no allegation to that effect in the petition. It is true that in the reply there is an averment which might be construed as so contending, but it is denied by a counter pleading, and if we should treat this method of forming the issue as the proper one (which is untrue) the evidence in the case fails to establish it.

The judgment should have dismissed the petition. Failing to do so it is reversed with directions to enter one in conformity with this opinion.

Hazelwood v. McKenna.

(Decided December 17, 1920.)

Appeal from Fayette Circuit Court.

1. **Appeal and Error—Verdict.**—A verdict of a jury will not be disturbed by this court unless it be palpably against the weight of the evidence.
2. **Appeal and Error—Evidence.**—Where there is clear and satisfactory evidence in support of the verdict it will not be disturbed by this court even though this court would have made a different finding on the facts.

W. P. KIMBALL for appellant.

H. E. ROSS and MILLER & MILLER for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

It is admitted by the parties to this appeal that appellant Hazelwood sold and agreed to deliver to appellee, McKenna, a bunch of hogs averaging 200 pounds each, at the price of \$10.00 per one hundred pounds. This contract was made in December, 1916, and the delivery of the hogs was to take place on the first of March, 1917, at which time the price was to be paid by McKenna to Hazelwood. The hogs were not delivered and McKenna brought this action against Hazelwood to recover damages for breach of contract in the sum of \$850.00. A trial resulted in a verdict for the full amount prayed and Hazelwood appeals.

No question is made with reference to the instructions of the court; nor does counsel for appellee point out any error in the introduction of evidence, but a reversal of the judgment is sought solely upon the ground that the verdict is not sustained by sufficient evidence. In brief of counsel for appellee it is stated that the jury "seems to have taken the bull by the horn, so to speak, and decided it (the case) in favor of appellee (plaintiff)." We therefore need only briefly review the evidence to determine whether the verdict is sustained by sufficient evidence.

First. We may say the petition of appellee, McKenna, sets forth the contract in the following way: "In the fall of 1916, defendant, Perry Hazelwood, sold to plaintiff one hundred hogs on foot at \$10.00 per 100 pounds, and promised and agreed with plaintiff to de-

liver him said hogs on foot, upon demand, in the month of March, 1917; and further promised and agreed that the said hogs would average 200 pounds each, in consideration of which plaintiff promised and agreed to pay defendant upon delivery of said hogs \$10.00 per 100 pounds for each 100 pounds of said hogs on foot delivered to him; that on the — day of March, 1917, the plaintiff demanded that the defendant deliver the said hogs sold to him by defendant as aforesaid, and that the defendant failed and refused and has continuously since said demand failed and refused to deliver to plaintiff said hogs or any part thereof; that plaintiff was at the time of said demand and has been at all times since said time and is now ready, willing and able to accept and pay for said hogs as aforesaid; that by reason of the breach of contract on the part of the defendant as aforesaid plaintiff has been damaged in the sum of eight hundred and fifty (\$850.00) dollars, no part of which has been paid."

The first paragraph of the answer of Hazelwood traverses the allegations of the petition. The second paragraph of the answer admits that in December, 1916, he (Hazelwood) agreed to furnish plaintiff with eighty hogs to average 200 pounds each, to be delivered to said plaintiff at the scales near the farm of defendant; that said hogs should be weighed and delivered to plaintiff at said point on the first day of March, 1917, at six o'clock a. m.; that the plaintiff failed to appear and receive and pay for said hogs at said time as he agreed to, and on or about the 5th day of March, when the plaintiff called or talked over the 'phone and inquired about said hogs, he did not make any demand for the delivery of same to him at that time or at any other time. The answer further avers that the time of delivery was of the essence of the contract, and that the defendant informed the plaintiff that he needed the money on the 1st day of March in order to meet certain obligations for rent which he was to pay on that date; that the plaintiff violated and repudiated his agreement with defendant by failing to appear at the time and place of delivery to receive and pay for the hogs.

Excluding the plaintiff and defendant, there were just two other witnesses, one who testified for the plaintiff, and the other who testified for the defendant. The evidence is very brief. Aside from that given by plaintiff and defendant the evidence is largely collateral.

The plaintiff, McKenna, after testifying that he lived in Lexington, and was and had been for some years engaged in buying and selling pigs and hogs as the agent of Price & Company, as well as upon his own account, stated that he was acquainted with the defendant Hazelwood and had been for eight or ten years before the trial and that he had traded with Hazelwood, buying from him eight or ten different bunches of hogs; that in December, 1916, he had a conversation with Hazelwood about one o'clock on Saturday, in one of the bank buildings in Lexington, at which no third person was present. The plaintiff was then asked:

"Q. State the conversation you had with Hazelwood with reference to the hogs? A. Mr. Hazelwood asked me what hogs would be worth in March and says I have a hundred and I can make them weigh two hundred by the first of March, and asked me what I would give for them, and I said, I don't know what they will be worth, but, I said, what will you take. And then at that time I was paying eight and one-quarter cents for hogs, and I said, I will take a chance on it and give you ten cents; he asked me ten for them and I said I would take a chance on them. . . Q. Then, as I understand you, the price had to go up one and three-fourths cents before you could even break even with your contract? A. Yes, sir; and I bought the hogs as of the first of March, to weigh two hundred pounds and was to be one hundred hogs, and I said, do you want a contract or I will put up the money or either furnish you a bond to take the hogs, they may go up or down, and he said, your word is all right, and I said, I will take them and it will be all right, and I said, I know they may go up or down; and on two occasions I met him before the first of March and asked him how the hogs are doing and one day on Cheapside I asked him how they were and he said, 'Hell, they are all dying with the cholera,' and I said mine is not dying, and he wouldn't even talk to me about the hogs. . . . Q. Had hogs gone up at that time? A. Yes, sir; one dollar a hundred then, and before the first day of March I tried to call Perry up and couldn't and on the first day of March between half past five and six o'clock I called up Perry's house and got either his wife or daughter, I couldn't say which, and told them to tell him to come to the 'phone and said, I am ready to receive those hogs this morning. . . . Q. That was in the morning between five and six o'clock on March 1st? A. Yes, sir;

and I had to have those hogs that day or some other hogs. Q. Why did you have to have those hogs that day? A. Because I had to furnish those hogs under contract with Mr. Price, that day, and so I called up Mr. Hazelwood and talked to him, and says to him, Perry, I am ready to receive those hogs this morning, and he said, Hell you hain't going to get any hogs from me, and I said, why, and he said, half of those hogs died with the cholera, and said I told you that a month ago, and I said, you know I would have got those hogs if hogs had gone down, I said you know I would have got them, and you know you would make me take them, and I said, you let me know whether you are going to let me have them, I says, I am going to do the same thing to you, and he said, I am not going to let you have them. Q. Did he give you any reason for not letting you have them? A. No, sir; no reason. Q. On that day what did you pay for hogs? A. I bought them in Cincinnati and paid \$13.00 and shipped them here. Q. What was the market price on that day of hogs? A. I would have paid \$13.50 on that day. Q. Was anything said at the time the contract was made between you and Mr. Hazelwood as to where the hogs were to be delivered. A. There never has been any question like that arise between me and him in weighing hogs or in buying hogs from him. Q. Had there been any definite place set in this contract where the delivery of the hogs should be? A. None on earth. Q. You said you dealt with Mr. Hazelwood many times before with reference to buying and selling hogs? A. Yes, sir. Q. What was the custom between you two as to the delivery of hogs, whether or not there was any definite place for delivery? A. I bought hogs from Hazelwood and sent them to Weisenbach, sent them there and settled from his weight, and I bought hogs from Hazelwood and sent them to Price the same way. Q. Was anything said during that conversation with Mr. Hazelwood at the time the contract was entered into or any other time that the hogs should be delivered at promptly six o'clock of March 1st at Mr. Persley's scales? A. No, sir; that question never arose; it is the buyer's place to be there if he wants to protect himself and see the hogs weighed whether at 5 or 3 or 1 o'clock or 6 o'clock in the morning; if I am to get there at 9 o'clock to weigh the hogs it is up to me to be there and attend to my own business. Q. Was Mr. Persley's scales ever mentioned to you? A. No, sir. Q. Did you have any other information

from Mr. Hazelwood as to the delivery of these hogs other than the definite message when he told you he would deliver them? A. No, sir. Q. Did you have any conversation over the 'phone about where the hogs were to be delivered? A. No, sir. Q. Did you ask him on that occasion whether or not he would deliver them? A. He said he would not let me have them; there was no question raised about where he would deliver them after he weighed them, if he weighed them at Persley's scales I would have been too glad to go after them. Q. On the morning of March 1st, did you go out and buy hogs? A. I did. Q. Where did you buy them? A. Louisville. Q. What did you pay for them? A. \$13.50 there. Q. What was the market price here? A. \$13.50 here at home. I would have paid for them that day right here at home."

In addition to the foregoing evidence McKenna further testified that hogs of the type he purchased were select heavies which at the Cincinnati market on the 1st of March, the time of delivery, were worth \$13.65, and the Chicago market was \$13.50 per 100 pounds for such hogs; and that the price of hogs had commenced to go up long before the 1st of March. He was sustained in his evidence by S. S. Price, of Price & Company, who conducted a slaughterhouse in Lexington.

On the other side appellant Hazelwood testified that he sold the hogs to McKenna in December for delivery on the 1st of March, saying, "I sold Mr. McKenna 80 hogs to weigh 200 pounds each to go at ten cents the first morning of March . . . 80. That is all I had. I sold him 80 to weigh 200 pounds at ten cents and taken on the first morning of March, and the first morning of March he never did come to get the hogs and never called up until the 4th of March at 9:30 o'clock." The defendant was sustained in part by his son, James Hazelwood, with reference to the conversation had at the bank with the plaintiff, but his evidence was very slight.

With the evidence of these four persons before the jury it determined that Hazelwood had sold and agreed to deliver at least 80 hogs, weighing 200 pounds each, to McKenna at the price of \$10.00, the delivery to be made on March 1st, and that the price of hogs of that character had advanced from \$10.00 in December to \$13.50 on March 1st; that Hazelwood refused to deliver the hogs but sold them at a higher price to other buyers; that the difference between the contract price, \$10.00

per 100 pounds on the hogs contracted to be delivered on the first of March, and the market price at that date, was at least \$850.00, the amount sued for. With this finding of fact we can find no fault because the evidence fully sustains it. The weight of the evidence is with the verdict, not against it, and as this is the only ground upon which we are asked to reverse the judgment a reversal must be denied and the judgment affirmed.

Judgment affirmed.

Southern Railway Company in Kentucky v. John T. Barbee & Company.

(Decided December 17, 1920.)

**Appeal from Jefferson Circuit Court
(Common Pleas, Fourth Division).**

1. Railroads—Duty to Protect Freight Consigned—Negligence—Loss of Property By Mob.—A railroad company's employees in charge of its yards are charged with the duty of protecting freight consigned therein. In such case the railroad company is an insurer and it cannot relieve itself from liability merely by pleading and showing that a mob was in progress unless it further shows that the destruction of property did not result through its negligence.
2. Railroads—Loss of Property in Transit Through Mob.—A railroad company may contract against liability for loss of goods in transit through a mob but it cannot contract against its own negligence, and it cannot relieve itself by showing that the fire was started by a mob, if it appears that by ordinary care it could have saved the property between the starting of the fire and its destruction.

HUMPHREY, CRAWFORD, MIDDLETON & HUMPHREY and
LOUIS SEELBACH, JR., for appellant.

LAWRENCE LEOPOLD for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

On June 27, 1917, Barbee & Company shipped a consignment of thirty-nine packages of whiskey from Milner, Kentucky, near Louisville, to a point in Texas, and on the next day shipped two barrels of whiskey to another point in the state of Texas, in each case taking a bill of lading. Neither of the consignments was delivered by the railway company, and this action was

commenced by Barbee & Company against the Southern Railway Company in Kentucky, initial carrier, to recover the value of the whiskey, alleged to be \$634.68, averring that the railway company had wrongfully and negligently failed and refused to safely transport or cause to be transported said whiskey from Milner, Kentucky, to the destination in the state of Texas, and then and there safely deliver the same to the consignee, as it had agreed in its bill of lading to do, and had wrongfully failed to account to Barbee & Company, or to any one for the plaintiffs for said whiskey, or any part thereof and had converted the same to its own use. The answer of the railway company traversed the material allegations of the petition. The answer further averred that the bill of lading, the contract between the parties, expressly provided that neither the defendant railway company nor any of its connecting carriers transporting said whiskey should be liable for any loss, damage or injury to same resulting from riots or consequences thereof; that while the said shipment of whiskey was in the ordinary course of transportation from Milner, Kentucky, to its destination in Texas, it was destroyed in and by virtue of a riot occurring in East St. Louis, Illinois; that in said riot and as a direct result thereof the said whiskey was set on fire and in this manner was burned and destroyed without negligence of any kind on the part of the defendant railway company; and further that the railway company had exercised all possible care to safely transport said whiskey and to deliver same to the consignee thereof, and that its destruction was without fault or negligence, or any breach of duty on the part of the railway company, but came about through causes entirely beyond the control of the defendant. A demurrer to the affirmative part of the answer was overruled, whereupon Barbee & Company filed reply in which, after traversing the material parts of the answer, it was averred that the railway company negligently delayed the transportation of the whiskey after it was delivered to it at Milner, and because of such negligence on the part of the railway company the said whiskey failed to arrive in East St. Louis prior to July 2nd, the date of its destruction by the riot, if it was so destroyed, and that the delay was caused by negligence of the railway company and but for said negligence on its part in failing to sooner transport said whiskey so that the same could arrive in East St. Louis and leave

East St. Louis prior to July 2, 1917, the said whiskey would not have become subject to the riot and fire ensuing therefrom; and it was further averred that the delay in transporting said whiskey was a proximate cause and reason for its destruction and the railway company is liable for said negligence. A general demurrer was sustained to this paragraph of the reply. It was further pleaded by the reply that on July 1, 1917, mobs formed in the city of East St. Louis, began committing various excesses and acts of violence and depredations; that hundreds of men began rioting in East St. Louis on July 1, 1917, and in defiance of the public authorities and that these facts were given great notoriety and the public had notice thereof and that the agents and employes of the railway company in charge of the shipment of whiskey knew, or by the exercise of ordinary care, could and should have known that the said mobs were committing said excesses and acts of violence and depredations in that city on July 1, 1917; that the mobs had not dispersed on July 2nd, and that on that day the mobs were committing acts such as endangered the safety of the consignment of whiskey; that the defendant railway company negligently and in disregard of the safety of the goods, permitted and caused the same to be carried over its line of railroad from the city of Louisville, into its yards in the city of East St. Louis while the riots were in progress and to remain in East St. Louis while the riots were in progress at that time for many hours after the arrival of the consignment in that city, and in doing so the railway company was guilty of such negligence as to make it liable for any damage resulting from any acts committed by said mob or said rioters on that date, including the burning of the whiskey. A general demurrer to this paragraph of the answer was overruled.

The rejoinder merely traversed the affirmative allegations of the reply. A trial before a jury resulted in a verdict for Barbee & Company for the full amount claimed, and the railway company appeals.

The parties filed a stipulation of facts which was read as evidence to the jury, and is as follows:

“(1) On June 27, 1917, the plaintiff John T. Barbee & Company delivered to the plaintiff, Southern Railway Company in Kentucky, at Milner, Kentucky, thirty-eight cases and one box of whiskey, for shipment to San Benito, Texas, consigned to the order of the

plaintiff with instructions to notify Roberts & Buesing, at destination, and a bill of lading was issued, executed and delivered by and between the plaintiff and the defendant, and accepted by the plaintiff, as the contract of shipment between the parties, a copy of which is hereto attached as exhibit 'A.'

"(2) The said thirty-eight cases and one box of whiskey were of the value of \$424.25.

"(3) On June 28, 1917, the plaintiff delivered to the defendant, at Milner, Kentucky, two barrels of whiskey, for shipment to Cameron, Texas, consigned to the order of the plaintiff, with instructions to notify W. J. Hair, at destination; and a bill of lading therefor was issued, executed and delivered by and between the plaintiff and the defendant, and accepted by the plaintiff, as the contract of shipment between the parties, a copy of which is hereto attached as exhibit 'B.'

"(4) The value of said two barrels of whiskey was \$210.43.

"(5) The shipment of thirty-eight cases and one box left Milner, Kentucky, on the line of the defendant, on June 27, 1917, and arrived in Louisville the next day (June 28, 1917).

"The shipment of two barrels left Milner, Kentucky, on June 28, 1917, on the line of the defendant and arrived in Louisville the same day.

"(6) These two shipments were at Louisville, Kentucky, placed in one car (S. F. R. D. 11250), and left Louisville at 4:30 a. m., on July 1, 1917, and arrived at the Coapman yards of the Southern Railway Company, in East St. Louis at 10:45 a. m., on July 2, 1917.

"At 4:30 p. m., on July 2, the said car containing the said two shipments was placed on track number 4 in the Sixth street yards, at East St. Louis.

"(7) About 8:00 p. m., on July 2, 1917, some houses, to-wit: private residences in the vicinity of the Sixth street yards and near the track, and place on said track, where said car was located, were set on fire by the rioters in East St. Louis, and the said car and the two shipments of whiskey therein contained were consumed by the said fire about 8:30 p. m., on July 2, 1917, which fire was communicated to said car from said residences, the conflagration having spread from the said residences to the said car.

"(8) The shipments of whiskey above referred to are those referred to in the petition."

From the newspapers filed in the record and from the evidence of witnesses it is quite manifest that on July 1, 1917, a race riot of no mean proportions broke out and was raging in East St. Louis, Illinois, and continued throughout that day and the next, resulting in much loss of life and property. Some members of the police force were killed by colored persons and this provoked the riot. Several hundred white persons joined themselves together and went through the city killing and attempting to kill all colored persons, or to drive them out of the city; later on they engaged themselves at burning and destroying the property of colored people and property in which colored people resided. Fires were started in all colored districts of the city and practically all of the so-called black belt was wiped out by the conflagration. The fury of the mob was intensified by its progress and towards the evening of the second day of July a number of fires were started in the negro district alongside and near the yards of the Southern Railway Company, and hundreds of frantic men were firing guns, fighting and threatening and otherwise creating a tremendous tumult near the yards of the railroad company in which the consignment of whiskey with much other freight was situated. Everybody in the city was alarmed by the size and fury of the mob and much of the property was threatened by destructive fires. The newspapers were full of lurid accounts of the doings of the mob. Notwithstanding this the railway company seems not to have taken any precaution whatever, at least none out of the ordinary, to protect the consignment of freight which is the subject of this litigation, nor in fact any freight of which there was a great quantity then in its custody in its yards in the mob stricken city. While there may have been a few watchmen in their several yards about East St. Louis, no extra precaution commensurate with the fire situation and the imminent danger from the mob, was exercised by the railway company, or its employes in charge of the yards, for the protection of the consignment of freight in litigation or any freight in the custody of the railroad in said yards. In fact, it appears from the evidence that the railroad officials in charge of the yards and whose duty it was to look after the safety of the freight therein left their posts of duty early in the evening and went to their homes without having made any special arrangements or effort to inform themselves of the progress of the fires

or the threatened danger to the other freight in the yards from the mob, although the rioting, shooting and burning were going on very near the Sixth street railway yards of the company in which this particular consignment was at the time and in which large quantities of other freight were also standing. Some of the houses burned were within a few feet of the railroad tracks on which loaded cars were standing. This district was largely occupied by colored residents, the object of the mob, and it was common knowledge that the mob was attempting to kill the negroes and to burn and destroy their property, and in fact had been for hours burning their houses and the houses in which they lived.

The railroad employes in charge of the yards were charged with the duty of protecting the freight consigned therein. In fact, the railway company was an insurer and it could not and can not relieve itself of liability merely by pleading and showing that a mob was in progress in the city and that a conflagration started by the mob spread to and consumed the freight in question, unless it further shows that such destruction did not result through its negligence. In other words, if the railway company, by the exercise of ordinary care, could have saved the freight consignment from the fire after its danger from the fire was discovered but failed to do so, it can not be relieved of responsibility by showing that a mob started the fire. It was charged with the duty of exercising ordinary care to save the freight consignment after the fire which threatened its destruction was discovered. If it failed in its duty in this regard it is liable. The accepted rule is that a railroad company may contract against liability for loss of goods while in transit through mobs or riots but it can not contract against its own negligence, and although a fire may be started by a mob the railroad company is not relieved of liability by merely showing that the fire was started by a mob, if the facts are sufficient to show, as in this case, that there was ample time between the starting of the fire and the destruction of the property in which the freight might, by the exercise of ordinary care on the part of the railroad company, have been removed from the danger zone to a safe place. For the purposes of this case, we might wholly disregard the fact that the mob started the fire. It is conceded that the fury of the mob was not in any degree directed toward the destruc-

tion of freight cars or their contents but only towards the shacks near the tracks in which negroes lived.

It is also agreed that the fires in the vicinity of the yards in which the consignment of freight was, started about 5 or 5:30 o'clock in the evening. According to some of the evidence these fires increased very rapidly, starting in different houses in the same district. One witness testifies that as many as ten or twelve fires were going at the same time in the same vicinity. Accompanying all this was a great uproar and much shooting, all of which was calculated to attract attention. There was much flame and smoke which could be seen for a long distance. Notwithstanding this the railway company did not provide any engine in the Sixth street yards that evening with which to handle the freight cars, and in case of emergency to remove them or shift them to avoid the several fires which were in progress nearby, and this though some of the houses in which colored people resided and which were that evening destroyed by fire stood within a few feet of the tracks of the railroad on which loaded freight cars were stored. Stranger still is the fact that no sufficient guard was placed in these yards on that wild night to assist in protecting the property of the railway company and freight in its charge, and no arrangements even were made by the railway officials to keep informed of the progress of the fires towards the freight yards. In fact, the master of the yards did not call up the conductor in charge of a yard engine to ask that he go to the rescue of the burning freight property until about eight o'clock, or perhaps a little later. In other words the fire had been in progress in the district of the freight yards for three hours or more before the railroad company even took the precaution to ask one of its yard crews to take an engine to the Sixth street freight yard and to try to save the burning freight. After this request was made, it took some twenty or thirty minutes for the engine to go from the place it was situated to the place of the fire. There is much evidence, in fact it is practically conceded, that if an engine had been placed by the railroad company in the Sixth street yards when the fires first originated in that district the consignment of freight, which was lost and of which complaint is now made, would have been saved. This was the plain duty of the railroad company. Common prudence, it seems, would have suggested the propriety of keeping a lookout where a mob

bent on destruction by fire was operating in close proximity to valuable property of which the railroad company was the trustee and insurer. These facts, it seems to us, fully warranted the jury in concluding that the railroad company was guilty of negligence, and the verdict finds abundant support in the facts.

Judgment affirmed.

Cummings' Administratrix v. Paducah Grain and Elevator Company.

(Decided December 17, 1920.)

Appeal from McCracken Circuit Court.

1. Negligence—Evidence.—Where the plaintiff relies upon the negligence of the defendant for recovery every fact necessary to show negligence must be proved or admitted—it can not be presumed.
2. Negligence—Actionable Negligence—Trespasser or Licensee.—Where a trespasser or licensee was killed by a descending elevator car while attempting to pass through an elevator shaft, and it is shown by the evidence that when the elevator was in about one foot of his head he gave an alarm, but there was no evidence to show how fast the elevator was going at the time, nor whether it could have been stopped by the operator by the exercise of the means at hand in time to have averted the danger, no actionable negligence was shown.

HENDRICK & BURNS for appellant.

MOCQUOT & BERRY for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

While engaged at his duties as agent and collector for an insurance company J. H. Cummings visited the office and plant of the Paducah Grain and Elevator Company in the city of Paducah, in December, 1918, and while there attempted to pass through an elevator shaft and was struck by the elevator car and crushed to death. His wife as administratrix instituted this action in the McCracken circuit court against the grain elevator company to recover for his death. At the conclusion of the evidence for the plaintiff the court instructed the jury to find and return a verdict for the defendant, elevator company, and the administratrix appeals, asking a reversal (1) because the elevator company was guilty of

wanton and willful negligence in pulling the cable of the elevator in the wrong direction and thus accelerating the speed of the elevator car in its descent on decedent instead of stopping it; (2) the elevator company was guilty of gross negligence in failing to protect Cummings from injury by the elevator after the discovery of his peril, and for these two reasons erred in giving the peremptory instruction in favor of the elevator company.

It appears from the evidence that Cummings in the performance of his duties as agent for the insurance company had visited the plant of the elevator company on two or more occasions before the accident in which he lost his life. About four o'clock on the day of the accident he went to the office of the company on the second floor of the elevator building and inquired for one of the employes of the elevator company and was told that he would be found in the shelling room of the building on the first floor. Cummings left the office and descended a stairway to an anteroom from which there was a door leading to the street and also a door on the other side leading to the interior of the building. At the foot of the stairs he turned through the door towards the shelling room in which he expected to find the employe with whom he had business. He was walking rapidly; the interior rooms were poorly lighted. He passed through one room and entered the room in which the elevator shaft was located. This shaft was about six or eight feet square and contained an electric elevator car which was operated by different employes of the concern in carrying grain or other products from one floor of the building to another. When the elevator was at the first floor persons passing from the entrance to the building to the shelling room as Cummings was attempting to do, walked over the floor of the elevator, but when the elevator was up they passed through the elevator shaft by swinging or jumping over the hole. The elevator was up at the time Cummings came to the shaft and he attempted to pass through the shaft to reach the shelling room, but when he entered the shaft he discovered the elevator coming down and he cried, "Stop the elevator, stop." At the time he made this cry the elevator was in about one foot of his head. According to the evidence of one witness a closed man was operating the elevator and upon the alarm from Cummings grabbed the cable of the elevator and pulled it up instead of pull-

ing it down, which would have brought it to a standstill. The elevator descended upon Cummings crushing him to death. No one saw the accident except Mrs. Pearl Spells, who testifies that she came into the anteroom of the elevator building just as Cummings came down the steps from the office and immediately followed him, thinking him to be an employe of the elevator company, into the room where the elevator shaft was located. She it was who testified to Cummings' cry of alarm and to the fact that the elevator was in charge of the colored man whom she says pulled the cable of the elevator in the wrong direction and when he discovered his mistake and the horrible accident that had resulted, jumped from the elevator and ran away. The plaintiff called practically all of the employes or persons in or about the elevator building at the time of the accident but no one of them saw or knew of the accident until after the dead body of Cummings was found beneath the elevator. They therefore knew nothing of what Cummings was doing or how he came to be there at the time of the accident. Each employe of the company testified in substance that he did not start or operate the elevator at the time of the happening of the accident and did not know how the elevator came to be started at that particular time. A foreman in charge of two colored helpers was on the third floor of the building loading sacks of corn cobs into the elevator which was then on a level with the third floor. One of the colored men was bringing the bags of cobs to the elevator while the other one was placing them in the elevator. They had both left the elevator to get other cobs and returned to find that the elevator had descended. By what means or for what reason they did not know. They went down stairs to investigate and found Cummings dead. There is no evidence tending to show that any person in the employ of the elevator company set the elevator in motion at the time it struck Cummings nor that any employe was in the elevator at that moment except what Mrs. Spells states on the subject, and she was not an employe of the concern and does not claim to know the colored man who was in the car or how he came to be there nor his duties, if he had any.

Cummings was either a trespasser or at most a licensee on the premises of the elevator company for he was there at his own instance and for his own benefit and was not directed or invited by anyone connected with the elevator company to go into or pass through

the room in which the elevator shaft was located. The public was not invited or expected to visit this inner room of the elevator plant, and the elevator company owed Cummings no duty save to do him no wanton or willful harm while on its premises. If, the elevator company had an employe on the elevator car at the time it descended upon Cummings and this employe received a signal from Cummings in the elevator hole before the car struck him, indicating he was in peril, it was the duty of the employe and the elevator company, as his master, to use all reasonable means at his command to stop the elevator and save the life of Cummings.

While Mrs. Spells testified that the elevator was coming down and that it was within about one foot of Cummings head at the time Cummings gave the alarm, and she observed the car, she does not state how fast the elevator was traveling or whether it could or could not have been stopped before striking Cummings. Plaintiff also called an expert electrician who had charge of the elevator and had examined it shortly before and immediately after the accident for defects, but this witness was not asked to state in what distance the elevator could be stopped nor was he told the rate at which the car was traveling at the time it descended upon Cummings, and given an opportunity to state whether the car could have been stopped by the exercise of ordinary care in time to have avoided injury to Cummings. All these witnesses were called by the plaintiff and these facts no doubt could have been shown, but they were not, and the trial court taking the view that no violation of duty to Cummings had been shown, sustained the motion for a directed verdict in favor of the elevator company and dismissed the action.

In Cooley on Torts the text is as follows:

"The general rule supported by authorities is that the owner or occupant of premises owes no duty to licensees and trespassers further than to refrain from willful acts of injury," and in commenting upon this text this court in the case of *Indian Refining Company v. Moberly*, 134 Ky. 822, said, "If this general rule is recognized as the principle applied in this case there could be no recovery, for it is not claimed much less shown that the injury to plaintiff resulted from the willful act of the defendant or its agents."

The case of *Johnson v. Paducah Laundry Co.*, 122 Ky. 369, is in many respects similar to the case at bar.

In that case the laundry company maintained a vat in which it kept hot water, in an open lot near the street. The top of the vat was even with the top of the ground, and Johnson at night time willfully left the street and turned into the lot on which the laundry was situated for purposes of his own. He fell into the vat and was terribly burned. In an action to recover damages we held the laundry not liable because it owed no duty to Johnson, a trespasser, save to do him no willful or wanton harm.

"The rule frequently has been stated that the owner or occupier of land owes no duty to keep his premises safe in behalf of trespassers, idlers, intruders, or others who come thereon without right or invitation. . . . And where danger is patent, and a licensee chooses to remain, he takes on himself all natural and probable results of the danger. . . . Very often the principle has been applied in the case of persons injured by falling through unguarded trapdoors and hatchways, or into excavations on the property. No distinction is to be drawn, according to the general use of terms, between persons coming within the description of 'licensees' and those who are trespassers."

20 R. C. L., pp. 57, 58 and 59.

"The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or willfully cause him harm. The licensee enters upon the premises at his own risk and enjoys the license subject to its concomitant perils."

29 Cyc. 449.

See also the following cases: *Davis v. Ohio Valley Banking & Trust Co.* (Ky.), 106 S. W. 843; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. reports 261; *Snyder v. Natchez R. River & T. R.*, 42 La. Ann. 302; *Kentucky Distilleries & Warehouse Co. v. Leonard*, 25 Ky. L. Rep. 2046, 79 S. W. 281; *Ingram v. Forburgh*, 73 App. Div. 129, 76 N. Y. Supp. 344.

So in this case the elevator shaft was used in connection with the business of the elevator company on its private premises. The car was run up and down in the shaft to carry grain and other supplies from one floor to another. It was employed in this business at the moment of the accident. At most Cummings was a licensee. His presence on the premises was unknown to the person

operating the elevator. The elevator company, therefore, owed him no duty whatever until it discovered his peril. There was no evidence tending to show his peril was discovered by the elevator company, or by any one in charge of the car in the elevator shaft in time to have avoided injury to him by the exercise of ordinary care. In the absence of such evidence the court properly instructed the jury to find and return a verdict for the elevator company.

Judgment affirmed.

Gray, Jr., Guardian v. Gray.

(Decided December 17, 1920.)

Appeal from Pike Circuit Court.

1. Infants—Indivisible Property—Sale of.—Where the interest of an infant in real property was sold because of its indivisibility, there being no exceptions to the report of the commissioners, the rights of appellants are concluded in their claim upon appeal that the property is divisible.
2. Infants—Sale of Indivisible Property—Correction of Judgment.—Where an infant's interest in real property was ordered sold because of its indivisibility, there should have been adjudged a lien for an amount incurred for street improvement, and the judgment to the extent of the lien should be corrected.

STRATTON & STEPHENSON for appellant.

CLINE & STEELE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming in part and reversing in part.

A certain lot in the city of Pikeville was jointly owned by E. E. Gray, W. W. Gray and V. C. Gray. According to the record the latter, who died some years ago, owned 5/24ths undivided interest in the said lot, which was 100 feet wide and 260 feet deep, and of the value of some \$6,000.00 to \$8,000.00. The interest of the deceased V. C. Gray in the lot is alone in litigation. At the time of his death he owed to the plaintiff, E. E. Gray, a note of \$350.00 with interest from December, 1917; he also owed to W. W. Gray and E. E. Gray a debt of \$84.05. His funeral expenses had not been paid, and

there were some other obligations unsatisfied. This suit to settle the estate of V. C. Gray was brought by E. E. Gray against the widow, heir and administrator of V. C. Gray and others, to subject the 5/24ths interest of V. C. Gray in the lot in Pikeville to the payment of his debts, on the averment that there was no personal property out of which to pay these obligations and that this was the only real property owned by V. C. Gray at the time of his death. It was also averred that the widow and infant did not reside upon the property and were non-residents of the state of Kentucky; that the property was indivisible and that it could not be divided without impairing its value as well as the value of the joint interests owned by W. W. Gray and E. E. Gray. The answer traversed the averment of indivisibility of the property and affirmatively alleged that the property was divisible, and the prayer asked that the property be divided and allotted in kind. There was no denial of the indebtedness or the right of the parties to subject the property to the claim of the creditors of V. C. Gray.

There is some controversy about the number of shares or interests owned by V. C. Gray in the property at the time of his death. He obtained title from his father, I. E. Gray, who conveyed the lot in question to Alma C. Gray, W. W. Gray, Eugene E. Gray, Roscoe C. Gray, Virgil C. Gray and Clare F. Gray, in 1897. Under this deed Virgil C. Gray took one-sixth undivided interest in the lot. Later on a sister and co-owner, Alma H. Gray, died intestate and without issue; thus her one-sixth reverted to her father, I. E. Gray. Later another child and co-owner died before the death of V. C. Gray, and before the death of the father, I. E. Gray, who survived the son V. C. Gray but died intestate before the commencement of this action. The interest which the child of Virgil C. Gray received from its grandfather, I. E. Gray, was not subject to the debts of the decedent, Virgil C. Gray, sued on herein, but there was only 4/24ths of the lot in question liable to the debts of V. C. Gray, Sr.

After issue joined upon the divisibility or indivisibility of the property the court appointed three commissioners to view the property and report upon whether the same was divisible, and if so to make such division and report the same in writing to the court.

The commissioners met upon the premises and performed their duties as directed by law and reported to

the court in writing that the property was not susceptible of advantageous division but that a division would unfavorably affect the interest of the infant defendant as well as that of co-owners, and recommended that no division be made but that the undivided interest of the infant defendant, V. C. Gray, be sold as a whole and the proceeds arising from the sale be applied to the satisfaction of the debts sued on. No exceptions were filed by either side to this report and in due time it was duly and regularly confirmed by the court; thereupon a judgment was entered by the court finding the property indivisible and directing a sale of the interest of the infant defendant in the property and the application of enough of the proceeds to satisfy the debt sued on, the remainder to go first as dower to the widow and the residue, if any, to the infant.

The infant and widow appeal.

It is now insisted that the court erroneously adjudged the property indivisible. In the argument of counsel for appellants it is asserted that the lot extends from one street to another and faces 100 feet or more upon each of said streets and that it is susceptible of division into four good sized building lots, either one of which would have a considerable salable value, and that one of them would be sufficient to satisfy the interest of the infant defendant, V. C. Gray. It appears to the court that this claim comes rather late, for it was in the province of the trial court to adjudge the property indivisible upon the report of the commissioners in the absence of any exceptions or evidence to the contrary, and the court having done so, the rights of appellants are concluded.

The only other contention of appellants which need claim our attention is that the court ordered the sale of the 1/24th interest, which the infant inherited from his grandfather in the lot, and the proceeds subjected to the debts of V. C. Gray, deceased, when in truth and in fact the said deceased, V. C. Gray, the collection of whose debts it is sought to enforce, never owned said 1/24th interest, but this 1/24th interest in the lot descended from the grandfather, I. E. Gray, to his grandchild, the infant defendant, V. C. Gray. In answer to this contention it may be said that this one-twenty-fourth interest was indivisible and the whole interest of the infant was properly directed to be sold. Moreover, the debt of \$84.05 was for a street improvement made along in front of the property in question and was a lien against and

upon all of the interest of the said V. C. Gray, Sr., as well as the whole lot and the interest of V. C. Gray, Jr., defendant herein. The trial court should have adjudged the one-twenty-fourth interest subject only to the \$84.05 indebtedness along with the other four-twenty-fourths interest of the infant defendant and in case the four-twenty-fourths interest was no more than sufficient to satisfy the other indebtedness sued on, then and in that event only should the claims be marshalled so that the \$84.05 should be held a lien against the one-twenty-fourth interest alone. In this respect the judgment below should be corrected, otherwise the judgment is affirmed.

Judgment affirmed in part and reversed in part.

Louisville & Nashville Railroad Company v. Commonwealth.

(Decided December 17, 1920.)

Appeal from Warren Circuit Court.

1. Railroads—Railroad Commission—Powers of.—The railroad commission being a creation of the statute can exercise no powers except those conferred by the statute.
2. Railroads—Stations—Powers of Court in Respect to.—A court has no independent jurisdiction to order a railroad company to build or repair a station as the legislature has conferred on the railroad commission powers in respect to stations, and when power in relation to specific matters has been given to an administrative body this body must take appropriate action concerning the matter delegated to it before the courts have jurisdiction to act.
3. Railroads—Power of Court in Respect to Stations and Other Matters Concerning Railroads.—A court may have independent jurisdiction to compel a railroad company to do the things needed to enable it to perform the purposes for which it was created when the authority to require it to do these things has not been conferred by the legislature on some administrative body.
4. Railroads—Power of Railroad Commission in Respect to Stations.—Section 772 of the Kentucky Statutes gives the railroad commission power to order stations "burned or otherwise destroyed" or that "become unfit for the accommodation of the public" to be rebuilt or repaired as the case may be.
5. Railroads—Power of Railroad Commission in Respect to Stations.—The railroad commission has no power to order a new station to take the place of an existing one. It can only order it so repaired as to make it fit for the public accommodation. But when

a station has been "burned or otherwise destroyed" it may order a new station built.

6. Railroads—Stations—"Burned or Otherwise Destroyed"—Definition of.—A station is "burned or otherwise destroyed" when from fire or other cause it has become totally unfit for use.
7. Railroads—Penalties for Failing to Comply with Orders of Commission.—If a railroad company fails to comply with proper orders of the railroad commission in respect to stations it may be punished under section 793 of the Kentucky Statutes.
8. Railroads—Railroad Commission—Powers Under Section 830 of Statute.—Section 830 of the Kentucky Statutes gives the railroad commission no power to enforce any orders or directions it may make under this section. It can only lay the facts before the attorney general and report to the legislature what it has done.

BENJAMIN D. WARFIELD, H. L. STONE, E. S. JOUETT, W. A. NORTHCUTT, SIMS, RODES & SIMS and J. H. McCHORD for appellant.

CHARLES I. DAWSON, Attorney General, M. M. LOGAN, T. W. & R. C. P. THOMAS and B. W. BRADBURN for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Reversing.

This litigation is the result of a controversy between the Bowling Green Business Men's Protective Association, acting on behalf of the citizens of the city of Bowling Green, and the Louisville and Nashville Railroad Company, and concerns the erection of a new passenger station at Bowling Green.

It had its origin in this way. In 1912 the Business Men's Protective Association filed with the Kentucky Railroad Commission a complaint setting forth that the passenger station facilities at Bowling Green were inadequate. Thereafter evidence was taken on the subject of the controversy, and on May 9, 1913, the following order was entered by the railroad commission:

"The parties hereto appeared by counsel and by consent it is ordered and adjudged by the commission that the present passenger station facilities at Bowling Green, Ky., are inadequate, insufficient and unsuitable for the purposes for which intended but that the defendant does not waive its right to question the power and jurisdiction of the commission to order a new station or changes in the present station. • Thereupon the defendant made it appear to the commission that it contemplates revising its main line of railroad from Nash-

ville, Tenn., to a point north of Bowling Green and that said improvement involved the construction of a new route so as to touch or run near Bowling Green southeast thereof, upon or in proximity to the survey heretofore made, and also involved the change of the passenger station at Bowling Green from its present location to some point on said proposed new line, and it urged said facts as a reason why it should not at this time construct a new station at Bowling Green.

"Whereupon it is by consent ordered that within three years from entry of this order defendant shall commence in good faith the location and construction of a new, modern, properly equipped passenger station to serve Bowling Green, Ky., or, if the proposed construction of said new line is within said three years, abandoned, then said new station is at once to be constructed at or near its present site, or elsewhere on said present line of railroad; but if ultimately located at the present site or elsewhere upon said present line of railroad it must be so located or constructed that the public will have access to same without having to cross any tracks."

At the same time and as a part of the foregoing order the following order was entered by the commission:

"Pending the construction of the new station herein contemplated the defendant agrees to maintain the present station in good condition and to make the following improvements in same:

"1. Have the Adams Express Company vacate the station building. Convert the room formerly occupied by it into a kitchen for the restaurant, and add the present kitchen to the dining room, thus making an enlargement which will be a material improvement.

"2. Straighten the track immediately east of and adjacent to the platform at the south end of the station so that it will be practically parallel with the track on the west of this platform. The result of this will be to widen the platform so that it will be as wide at its south end as it is at the depot building and same will then be extended all the way to Main street.

"The area of the present platform south of the station is about 2,400 sq. ft.; the area of the new one will be 4,200 sq. ft.; or an increase of 75%. This platform will be covered with a shed.

"3. Have a septic tank installed for sewage. This was suggested by the committee as the method in use in

connection with the best buildings at Bowling Green, in view of the city having no sewerage system.

"4. Remove the stoves, some ten or twelve in number, and install a steam heating system.

"5. Provide and maintain adequate lights to keep the station sufficiently lighted.

"This cause is filed away subject to be reinstated by either party or by the commission upon ten days' notice to the parties."

The three years mentioned in the foregoing orders having expired and the railroad company not having changed its line of road at Bowling Green or taken any steps to do so and not having erected a new station or taken any action indicating its purpose to do so, the railroad commission, upon the request of the business men's association, held a meeting in June, 1916, after notice to the railroad company, for the purpose of inquiring into the failure of the company to comply with its agreement made in 1913 to erect a new station, and to enter such orders as might seem to be proper. At this meeting the commission heard other evidence on the subject of the controversy, and thereafter, on October 24, 1916, it entered, after reciting the foregoing facts, the following order:

"In view of the premises the commission feels under a duty to exercise what it conceives to be its authority under the law to require the defendant company to comply with the order heretofore entered and agreed to.

"To this end the order heretofore entered and agreed to is hereby reaffirmed and amended, and the commission finds that the evidence, and a personal inspection of the physical conditions, establish the following facts relative to the station maintained by the defendant company at Bowling Green, Kentucky, to-wit: That said station is unfit for the accommodation of the public; that the same is inadequate, insufficient and unsuitable as a passenger station to accommodate the patrons of said road and the travelling public; that the present inadequate facilities result in danger to the traveling public who are required, in leaving the train or in going to board the train, to pass in close proximity to trucks laden with trunks, boxes and other articles of merchandise which are liable to fall from said trucks and which, if they should do so, would injure passengers or patrons of said road; that as said station is at present constructed and maintained the travelling public are unnecessar-

ily required to cross the tracks in order to reach the said station.

“Therefore, it is the order of the commission that the chairman of said commission shall send a copy of this opinion to the president of the defendant, Louisville and Nashville Railroad Company, and notify said president in writing to rebuild the station at Bowling Green, Ky., within ninety days after the receipt of such notice, and that said notice shall contain the following requirements concerning the rebuilding of said station, to-wit: That said station shall be a new, modern and properly equipped passenger station and adequate, sufficient and suitable for the purpose for which it is intended, and that said new station shall be so located and constructed that the public will have access to same without having to cross any tracks approaching said station from the east.

“It is the further order of the commission that if the requirements herein demanded cannot be reasonably complied with in the time prescribed, to-wit: ninety days, that additional time shall be granted from time to time as the necessity of the occasion is made manifest, provided that the defendant company in good faith, and within a reasonable length of time manifests its determination and willingness to carry out the provisions of this order.”

Thereafter, and in March, 1917, the Commonwealth of Kentucky, suing for the use and benefit of the Bowling Green Business Men's Protective Association and the people of Bowling Green, brought this suit in equity in the Warren circuit court against the railroad company. The petition, after setting out the facts as we have stated them, averred:

“That, as a matter of fact, the said defendant has for more than five years, and does now unlawfully maintain a station and depot at Bowling Green, Ky., which is unfit for the accommodation of the public; that the same is inadequate, insufficient and unsuitable as a passenger station to accommodate the patrons of said road and the travelling public. That the present inadequate facilities result in danger to the travelling public who are required in leaving the train, or in going to board the train, to pass in close proximity to trucks laden with trunks, boxes and other articles of merchandise which are liable to fall from said trucks and which, if they should do so, would injure passengers or patrons of said road;

and as said station is at present constructed and maintained the travelling public are unnecessarily required to cross tracks in order to leave said station."

The prayer of the petition was:

"For a judgment against the defendant, Louisville & Nashville Railroad Company, and such orders as will require and compel the defendant to obey and comply with the order of the railroad commission duly entered of record in the office of said commission and filed as a part of this proceeding; and that such orders may be entered as will require the defendant to comply with its statutory duties under section 772, Kentucky Statutes, Carroll's edition 1909; and for such other orders as will require the defendant to rebuild the station at Bowling Green, Ky., so that said station shall be a new, modern and properly equipped passenger station and adequate, sufficient and suitable for the purposes for which it is intended and that said new station shall be so located and so constructed that the public will have access to same without having to cross any tracks approaching said station from the east."

To this petition a general demurrer was filed by the railroad company and overruled, and thereupon the railroad company filed its answer, in which, after denying that the station at Bowling Green was inadequate or in any respect insufficient for the use of the public, further set up that in accordance with its agreement made in 1913 to make certain repairs and improvements it had at an expense of \$9,000.00 completed all the repairs and improvements that it undertook to make.

It further challenged the authority of the railroad commission to require it to entirely rebuild said station or to build a new one, and averred that it intended at the time the agreement of 1913 was made and during the three years thereafter to erect a new depot, but the conditions produced by the war rendered it impossible that it should make its improvements. It further set up the fact that, pursuant to an act of Congress, the United States government in December, 1917, took over the management and control of all the roads in the United States and during the time its road was in the possession of the government it was unable to make improvements contemplated.

To this answer a general demurrer was sustained and the railroad declining to plead further the Warren

circuit court in June, 1919, entered an order adjudging that:

"The defendant, Louisville & Nashville Railroad Company, shall comply with the orders of the Kentucky Railroad Commission entered on the 24th day of October, 1916, and set forth in the petition of plaintiff and shall rebuild the passenger station at Bowling Green, Ky., so that said station shall be a new, modern, and properly equipped passenger station and adequate, sufficient and suitable for the purpose for which it is intended, and that said station shall be located and so constructed that the public will have access to same without having to cross any tracks of the defendant railroad company, approaching said station from the east, and the court further orders and adjudges that defendant, Louisville & Nashville Railroad Company, shall commence the rebuilding and erection of said passenger station at Bowling Green, Ky., in accordance with the aforesaid order of the Kentucky Railroad Commission and in accordance with this judgment, within 120 days from the entry of this order, and within 90 days from the entry of this order shall submit and file with the Kentucky Railroad Commission for its examination, inspection and approval, plans and specifications for said passenger station so ordered to be erected and built, together with the estimated cost of same and shall also file in this court, if in session, and, if not in session, in the clerk's office thereof, copies of said plans and specifications and estimated cost.

"The court reserves control of this cause and the right at any time, by proper orders, to enforce compliance with this judgment and to make such future orders as may effectuate its purposes."

From this judgment the railroad company prosecutes this appeal.

At the time the case was prepared and when the judgment was rendered the railroads of the country were in the possession of the federal government, although since then they have been returned to their owners, and in the argument of the case considerable attention has been given by counsel to a discussion of the proposition that the railroad commission was without power to order a new station constructed during the period of federal control of the railroad; but in the view we have of the law controlling the case it will not be necessary to spend any time in considering this question

and it will not be further noticed. It is also insisted that the order of the railroad commission and the judgment of the court are both void for uncertainty, but as the decision of the case will turn on other points it will not be necessary to determine the sufficiency or definiteness of the order or judgment.

It will be observed that the court proceedings had their basis in the action taken and the orders made by the railroad commission, and therefore we think the decision of the case on the record before us must turn on the question whether the railroad commission under the law and facts had the power to order that a new station be erected. We say this because independently of whatever power the railroad commission may have had to order that this be done we do not think the Warren circuit court had jurisdiction to enter the judgment that it did or any judgment or order in reference to the reconstruction or rebuilding of this station.

The absence of jurisdiction on the part of the court in a state of case like this grows out of the fact that the legislature of the state has, by statutes that will be later noticed, conferred on the state railroad commission, power to take action in respect to the building and repair of railroad stations, and when power in relation to specific matters has been confided by the legislature to an administrative body created for the purpose this body must take appropriate action concerning the matters delegated to it before the courts have jurisdiction to act in respect thereto. *State v. Chicago R. R. Co.*, 19 Neb. 476; *People v. B. H. R. R. Co.*, 172 N. Y. 90; *Com. v. L. & N. R. R. Co.*, 120 Ky. 91.

We do not however intend by this statement to imply that a court of competent jurisdiction would not have original power to compel in appropriate proceedings a railroad company to do such things as might be needed to enable it to perform in a reasonably satisfactory way the purposes for which it was created, when the authority to require it to do these things has not in the first instance been conferred by the legislature on some administrative body.

Illustrative cases on this subject are: *Southern R. Co. v. Hatchett*, 174 Ky. 463; *Northern Pacific R. R. Co. v. Washington*, 142 U. S. 492, 35 Law Ed. 1092; *Mobile & Ohio R. R. Co. v. People*, 132 Ill. 559; *State v. Repollican Valley R. R. Co.*, 17 Neb. 647, 52 Am. Rep. 424,

See further cases cited in 17 L. R. A. (N. S.) 822; and Elliott on Railroads, vol. 1, sec. 641.

The question, however, as to the extent of the power of the courts in this respect is not involved in this case, because, as we have seen, the judgment of the court that is appealed from did no more than undertake to compel performance by the railroad company of the order made by the railroad commission.

Coming now to the power of the railroad commission in dealing with matters like the one here involved, reference must be made to sections 772 and 830 of the Kentucky Statutes.

Section 772 reads as follows:

“Any company that has established and maintained throughout the year for five consecutive years, a passenger station at a point on its road, shall not abandon such station without the written consent of the railroad commission; and if any station used by a company is burned or otherwise destroyed, or becomes unfit for the accommodation of the public, the railroad commission shall notify, in writing, the manager or chief officer in this state of the company owning or using such station to rebuild or repair the same, as the case may be, and such company shall, within ninety days after such notice, comply with the requirements thereof; and that every company operating a railroad in this state shall provide a convenient and suitable waiting room and water closet or privies at all depots in cities and towns, and at such other stations as the railroad commission may require on its lines, and keep and maintain the same in decent order and repair.”

In section 830 it is provided that:

“Whenever, in the judgment of the commission, after a personal examination of the same, it shall appear that repairs are necessary upon any railroad, or when, from complaint made or their own knowledge, they shall have reason to believe that the tracks, bridges, tunnels or other structures of any company are in an unsafe or dangerous condition, or unfit for public travel, or that any additions to, improvements, or changes in the stations or terminal facilities are needed for the convenience and security of the public, they shall give notice in writing to the company owning or operating such road of the repairs, improvements or changes they deem proper and necessary, and shall afford such corporation an opportunity to be heard in reference thereto;

and if the company shall neglect or refuse to make such repairs, improvements, or changes within a reasonable time after such hearing, if a hearing is requested by the company, and the commissioner shall believe that such improvements or changes are proper and necessary after a hearing if one is had, they shall lay the facts before the attorney general for his action and shall report the same fully to the next legislature; no examination, request, advice, or report of the commission shall, in any way, affect the duties or obligations of any company or relieve it from any liability."

It will be observed that section 830 gives the railroad commission broad discretion, but no power, in exercising a general advisory supervision over the tracks, bridges, tunnels, stations, structures, and terminal facilities of the railroads of the state; but when the commission has investigated the conditions in respect to the matters mentioned, all it can do is to call the attention of the delinquent company to the repairs, improvements or changes that in the opinion of the commission ought to be made, and then, if the company neglects or refuses to make them, lay the facts before the attorney general of the state for his action and report to the legislature what it has done.

Under this section the legislature very carefully withheld from the commission the power to enforce through its own orders or with the aid of court proceedings any recommendations made by it. Nor does this or any other section of the statute make provision for the imposition of a penalty of any kind on a railroad company that fails or refuses to make the repairs, improvements or changes mentioned in section 830 and that are recommended by the commission.

As this section conferred no power on the commission or the courts to require a railroad company to do anything, but, on the contrary, by express words takes from the commission such power, and by fair inference excludes the courts from taking any action that would be effective in compelling railroad companies to do the things recommended by the commission, it is at once apparent that the action taken by the railroad commission and the jurisdiction and authority attempted to be exerted by the Warren circuit court were not under this section but under section 772.

Looking now to section 772 it will be noticed that it undertakes to regulate three separate conditions relat-

ing to railroad stations: (1) Prohibiting without the consent of the railroad commission the abandonment of a station that has been maintained for five years; (2) giving the commission authority to notify a railroad company when any station used by it has been destroyed or becomes unfit for the accommodation of the public and directing the railroad company to comply with the orders of the commission; (3) requiring every company to provide convenient and suitable waiting rooms and conveniences in cities and towns and at such stations as the commission may require.

The only part, however, of the section that we are concerned with in this case is that reading: "and if any station used by a company is burned or otherwise destroyed, or becomes unfit for the accommodation of the public, the railroad commission shall notify, in writing, the manager or chief officer in this state of the company owning or using such station to rebuild or repair the same, as the case may be, and such company shall within ninety days after such notice comply with the requirements thereof."

It is insisted by counsel for the complainants that this part of the section might fairly be construed to authorize the railroad commission to order a new station to be built when by reason of traffic and other conditions the existing one was not sufficient for or not suitable for the accommodation of the public; while counsel for the railroad company contend that the railroad commission has no authority to order a station to be rebuilt, or, in other words, a new station built, unless the one previously located at the place has been burned or otherwise destroyed.

This statute must be construed according to the rules applicable to other statutes, that is, so interpreted as to carry out the reasonable intention of the legislature as expressed in the statute when read and considered as a whole. When so read and considered it contemplates two conditions: the first arises when a station is "burned or otherwise destroyed," the second when a station "becomes unfit for the accommodation of the public." When the first condition exists the commission has authority to notify the company to "rebuild the station;" when the second condition exists it has authority to notify the company to "repair the same."

The word "burned" and the word "destroyed" have reference to a state of case in which the station has been

rendered wholly unfit for its intended use by fire or other cause. If a station has been "burned" and thereby totally destroyed or injured to such extent as to make it wholly unfit for use it seems clear that a new station must be built to take its place, and so if it was totally destroyed or so injured by other cause than fire as to make it wholly unfit for use a new station must be built to take its place. In either of these contingencies it is plain that the station would not be merely "unfit for the accommodation of the public" as there would be in effect no station at that place in existence. On the other hand, when a station merely becomes "unfit for the accommodation of the public" the reasonable meaning is that there is a station in existence at the place, the only fault or defect in which is caused by the fact that it has been permitted to become unfit for the accommodation of the public, and in such a state of case the statute provides that the company shall "repair the same," that is to say, remove the faults or defects that render it unfit for the accommodation of the public.

The words "burned" and "destroyed" are in common usage and when applied to buildings generally mean that the building has been made completely useless for the purpose intended. These words have no technical meaning, as may be seen by an examination of Webster's Dictionary, and Words and Phrases. The legislature uses them interchangeably and as meaning in effect the same thing, but produced by different causes.

Accordingly we do not think this statute can fairly be construed to authorize the railroad commission to order the company to rebuild a station when the former one has not been "burned or otherwise destroyed" but is only "unfit for the accommodation of the public." If the existing station is unfit for the accommodation of the public the authority of the commission is limited to notifying the company to repair the same so that it may be made fit for the accommodation of the public. Railroad stations, or depots as they are commonly called, are necessary parts of every railroad system, and the purpose of the legislature was twofold; first, to require railroad companies to have stations, and, second, to maintain them in such condition as to be fit for the public accommodation. If an existing station building is burned or otherwise destroyed, and this means completely demolished as a station building, or so nearly so as to be destroyed in the usual meaning of that word, the rail-

road commission may order a station to be built, and if the company fails to comply with this order it is subject to the penalties denounced in section 793.

Cases may and do arise in which the station building has not been burned or otherwise destroyed but at the same time is unfit for the accommodation of the public, and when this condition arises, if the railroad company fails to comply with the reasonable direction of the commission to repair the building so that it may be fit for the accommodation of the public and the railroad company fails to do this, it may be subjected to the penalties set forth in section 793.

With this understanding of the meaning and effect of this section it is apparent that the railroad commission had no power to order the company to erect a new station at Bowling Green, because the station there at the time the order was made had not been "burned or otherwise destroyed;" it was simply unfit for the accommodation of the public, and, this being so, the power of the commission was limited to ordering such repairs to be made as would put the station in such condition as would make it fit for the public accommodation. The railroad commission, however, did not do this, and in ordering a new station to be erected exceeded its authority under the statute, and the Warren circuit court likewise exceeded its jurisdiction and power in attempting to enforce this void order of the railroad commission.

We say the order of the railroad commission was void because, being a creation of the statute, its powers are confined to those fairly conferred by the statute, and when it undertakes to exceed these powers its action is not effective for any purpose; accordingly the ruling of the commission did not furnish any basis for these court proceedings. 22 Ruling Case Law 783; 10 Corpus Juris 54.

It is further pressed on our attention by counsel for the complainants that the railroad company entered into an enforceable agreement with the railroad commission to build a new station at Bowling Green, and as the judgment of the Warren circuit court only required it to do this that judgment should be affirmed.

The record shows without dispute that in 1913 by the "consent" of the railroad company it was ordered and adjudged by the commission that "the present passenger station facilities at Bowling Green, Ky., are in-

adequate, insufficient and unsuitable for the purpose for which intended." And that the railroad commission by the further "consent" of the railroad company "ordered that within three years from the entry of this order defendant (railroad company) shall commence in good faith the location and construction of a new, modern, properly equipped passenger station to serve Bowling Green, Ky." These consent orders, as will appear in other parts of the opinion, contained certain stipulations not necessary to mention, as our only purpose here is to set forth the fact that the railroad company agreed that the Bowling Green station was inadequate, insufficient and unsuitable, and further agreed that within three years, subject to the exceptions mentioned in the order of the railroad commission, it would commence in good faith the location and construction of a new, modern, properly equipped passenger station.

On the record before us we do not see our way clear to determine the meaning or effect of this consent or agreed order made between state railroad commission, the only body in the state invested with authority over the subject matter here in controversy, on the one hand, and the railroad company, a Kentucky corporation, on the other hand, because the case in the court below was not prepared with a view of having the court determine the meaning or effect of this agreement.

We may, however, with propriety say that this opinion is not to be construed as in any manner obstructing the right of the Commonwealth to institute and maintain on behalf of the citizens of Bowling Green if it desires to do so an appropriate action in the Warren circuit court for the purpose of having determined whether the agreement entered into by the railroad company is one the specific performance of which may be compelled in court proceedings.

Wherefore the judgment is reversed with directions to dismiss the petition.

Equitable Trust Company of Dover, Kentucky, Administrator, et al. v. Bays, Administrator, et al.

(Decided December 17, 1920.)

Appeal from Greenup Circuit Court.

1. **Executors and Administrators—Appointment, Qualification and Tenure.**—Decedent died intestate in January, 1918; two terms

of the county court having been held after his decease and no one having applied for appointment as administrator under Ky. Stats., sec. 3896, the court was authorized under Ky. Stats. 3897, to appoint an administrator for the estate upon motion of a creditor.

2. Courts—Minute Books.—Minute books are not intended as permanent court records but are solely for the purpose of keeping notes of the business that comes before the court or is transacted by it. Matters written therein are not entitled to the weight or verity of court orders duly signed.
3. Courts—Speak Only By Orders—Signing By Judge.—Courts of record speak only by their orders duly entered and signed in a book provided for that purpose, and the records of the proceedings of the court do not become final or binding until they are signed by the judge.
4. Courts—Appointment of Administrator.—An order appointing an administrator on the motion of a creditor entered on the order book through the mistake of the clerk is of no legal effect where this order not only was not signed, but the court refused to approve the bond and caused a notation to be made on the order book that same having been entered through a mistake it was stricken from the record, and in a subsequent order appointing another administrator and duly signed by the judge the facts are specifically set forth.

BRUCE & MILLER, W. T. COLE and A. D. COLE for appellants.

J. W. WOOD, J. B. BENNETT and WOODS & BRYSON for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

M. J. Ealey died intestate January 21, 1918, a resident of Greenup county. March 5th, at a special term of the county court the Equitable Trust Company of Dover, Mason county, Ky., was appointed administrator of the estate and executed bond as such. March 7th, a statement was filed by the widow of decedent, waiving her right to act as administratrix and requesting the court that her father be appointed in her stead, and this was done at a special term of the court on this date.

The Greenup county court meets on the first Monday of the month. In March, 1918, this fell on the fourth day. The order appointing appellant as administrator was not signed by the county judge, nor was its bond as such approved, but at the foot of said order, on the order book, appears this notation:

“The above order was entered through error on the part of the clerk and never was intended to be placed on the record as an order and is stricken out.”

In the order of March 7, 1918, which is entered on the same page of the order book as the order of March 5th, it is recited:

"On this day Wm. H. Bays the father-in-law of M. J. Ealey, appeared in open court and filed waiver of Martha J. Ealey, *dec'd.*, dated March 4, 1918, waiving her right under the statute to be appointed administrator of the said M. J. Ealey's estate and moved the court to set aside the order made on the 5th day of March, 1918, appointing the Equitable Trust Co., of Dover, Ky., as administrator of the said M. J. Ealey's estate and to appoint him, the said Wm. H. Bays as administrator of the said estate of M. J. Ealey, *dec'd.*, and offers to execute bond and qualify as said administrator, and the court not having signed the order appointing said trust company, as said administrator, and not having approved said trust company's bond as said administrator, sustains said Bays motion, said order appointing the said Equitable Trust Co., as administrator aforesaid is hereby set aside and held for naught."

Thereupon Bays took the oath and qualified. This order is signed by the county judge. On the following day, to-wit, March 8th, appellant moved the court to set aside the order entered on the preceding day: (1) On the ground that the trust company had been appointed administrator after two terms of the county court had expired following the death of decedent; (2) because no one had previously applied for letters of administration upon said estate; (3) that appellant upon its appointment had duly qualified, taken the oath of office and proceeded to discharge its duties; (4) because the order of March 7th was entered without notice to it.

The motion was overruled and later this suit was filed to set aside the order of March 7th, which petition upon hearing was dismissed and to reverse that judgment appellant has prosecuted this appeal.

In Kentucky Statutes, section 1058, it is provided there shall be a regular term of the county court in each county once every month on Monday, and special terms may be held at any time for the transaction of any business except the probating of a will or granting certain licenses, and that the court may adjourn from time to time until the business is disposed of.

Kentucky Statutes, section 3896, provides the precedence in the right of administration, preference being

given to the surviving spouse, and then to such others as are next entitled to distribution.

In section 3897 it is provided that if no such person apply for administration at the second county court from the death of an intestate the court may grant administration to a creditor, or to any other person in the discretion of the court.

Appellant was appointed on motion of a creditor. The March term was the second term after decedent's death, and if this term consisted of but one day, as the record indicates, and no one mentioned in section 3896, *supra*, had asked to be appointed, the appointment of appellant was authorized.

Courts of record speak only by their orders duly entered and signed in the books provided for that purpose. Nor do records of the proceedings of the court become legal orders in that sense of the term, that is, final and binding, until they are duly entered upon the order book and signed by the judge, and when he signs the record the whole of that day's proceedings is thereby vitalized and the orders become operative at the same moment.

Commonwealth v. Chambers, 1 J. J. Marsh 114; Revill's Heirs v. Claxon's Heirs, 12 Bush 558; Ewell, &c. v. Jackson, &c., 129 Ky. 214, 110 S. W. 860; Ralls, et al. v. Sharp's Admr., et al., 140 Ky. 744, 131 S. W. 998; Fox v. Lantrip, 162 Ky. 178, 172 S. W. 133.

Kentucky Statutes, section 1060, provides for the authentication of the orders of the county court by the regular or special judge.

The record shows that the order of March 5th appointing appellant was entered on the order book by the clerk through mistake and not only did the judge refuse to sign it, but he caused the endorsement to be made on the order book that on account of this error the order was stricken from the record, all of which is set out in detail in the later order of March 7th.

That the order of March 5th, 1918, was duly entered on the minute book is of no avail, since it was not the intention that permanent records of the court should be preserved in minute books, which are solely for the purpose of keeping notes of the business that comes before the court, or is transacted by it. The matter written in minute books is not entitled to the weight or verity of orders recorded in the order book of the court.

The facts in *Fox v. Lantrip*, *supra*, are quite similar to those found in the present record. It appears in that case that on the 19th of October, 1909, an order was entered by the fiscal court fixing the salary of the school superintendent at ten cents per pupil, and thereafter, to-wit, at a meeting held November 16, 1909, the salary was fixed at \$1,500.00 per annum. It was contended that the so-called order of October 19 was merely a minute made by the clerk, which was never read as required by law, and when the court met November 16, 1909, it made an order which was duly entered, read, approved and signed, by which it refused to approve the earlier order and directed that it be set aside. This contention was sustained, the court holding there was no necessity for the fiscal court at its meeting on November 16th to make any order rescinding or setting aside the order entered by the clerk on October 19th, since it was invalid, and that an order or a judgment of a court of record never has any validity until it is signed by the authority designated by law for that purpose. It was further said that if a mere minute was made by the clerk of the so-called order of October 19, which was never properly approved and signed by the judge, but was thereafter written out by the clerk upon the order book and at the adjourned meeting of November 16th, it was not approved but instead was set aside and corrected and an order then entered fixing the salary of the superintendent, it would be immaterial whether the court adjourned on October 19th, or whether they failed to adjourn on said day and treated that day and November 16th as one day, as the order was not entered, read, approved or signed October 19th and could have no validity until the same was done.

In the present case not only does it appear that the entry was made on the order book through error of the clerk and the court did not sign this order, but when the error was discovered, the court made the notation at the foot of the order striking it from the record, and in the order of March 7th, which was signed, attention is called to this fact, at the same time the court expressly refused to approve the bond of appellant as administrator. The court did all it could to destroy the earlier order. The notation at the foot thereof and the subsequent order were efficacious to nullify and vitiate the earlier order the same as if it had never been entered on the book, or as if it had been wholly erased therefrom. The conclu-

sion herein reached renders it unnecessary to discuss the question of notice, since appellant was not a *bona fide* administrator. The alleged order of its appointment having been stricken from the record there was no legal or valid appointment of appellant as administrator and it was not entitled to be recognized as such.

Entertaining no doubt of the correctness of the judgment appealed from same is accordingly affirmed.

B. P. Jones & Company v. Cash.

(Decided December 17, 1920.)

Appeal from Lincoln Circuit Court.

1. Vendor and Purchaser—Bonds for Title.—A title bond is a contract to convey and can not take the place of a recorded deed, and while it is insufficient to pass a legal title it gives to the holder an equitable right superior to the claim of title on the part of a subsequent purchaser with notice.
2. Vendor and Purchaser—Bonds for Title.—Actual possession of land under a title bond is notice to would be purchasers of the fact that the possessor who claims to own it has an interest in the property.
3. Vendor and Purchaser—Bonds for Title.—A subsequent purchaser with actual notice of the claim of one in possession under a title bond takes subject to the rights of such possessor.

LEWIS L. WALKER and GEO. D. FLORENCE for appellant.

J. B. PAXTON for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Asserting his ownership and right to the possession of a parcel of land containing a livery stable in the town of McKinney, Kentucky, appellant, B. P. Jones, under the name of Jones & Company, instituted this suit to quiet his title to said property which he acquired by deed dated April 20, 1918, from D. S. Riffe and wife. It is alleged appellee was wrongfully claiming title to the property under a title bond from Riffe and wife, executed in January, 1918, which the court is asked to cancel. The title bond to Cash was never put to record and appellant says he had no knowledge of the existence of same prior to the time he purchased the land, and furthermore that

at the time of his purchase appellee informed him he had no claim to said property after January 1, 1919.

Appellee relies upon two writings, one dated January 10, 1918, the other January 16, 1918, the latter being merely a confirmation of a prior sale evidenced by the earlier paper, the payment of the consideration by agreement to be deferred until a flaw in the title was removed. Appellee was given the right to collect rents from the property accruing after January 1, 1918, and he alleges he took possession of the property immediately upon the execution of the instruments aforesaid, and has been in possession continuously since said date. The answer was made a cross-petition with the prayer that the deed to appellant be cancelled and Riffe or the commissioner be directed to convey the property to appellee.

Since no question is raised as to the validity of the title bond relied upon by appellee it becomes necessary for us to consider only whether Jones had actual notice of its execution at the time he purchased the property.

A title bond is a contract to convey and while it can not take the place of a recorded deed, and is insufficient to pass a legal title, it gives to the holder an equitable right superior to the claim of title on the part of a subsequent purchaser with notice. *McGuire, etc. v. Whitt*, 25 Rep. 2275, 80 S. W. 474; *Farmer v. Cornett*, 174 Ky. 560, 192 S. W. 628, 39 Cyc. 1231.

If, therefore, appellant had notice of the execution of the title bond at the time of his purchase the claim of appellee is superior and the court properly dismissed the petition.

Several witnesses testify appellant knew of the existence of the title bond and that he commented upon the purchase of this lot by Cash and asked what he was going to do with the barn. This is denied by Jones. It is also in evidence that some time after Cash took possession Jones wanted to put some of his stock in the barn and he was told if he did so he would have to pay rent like every one else did. When the rent was due in January, Jones was informed that his stock would be turned out if it was not paid. Failing to pay the rent his stock was turned loose, seemingly without protest or complaint on his part.

Jones said he did not return his stock to the stable because he did not want to get into a controversy. As a general proposition when a person is in possession of land under an unrecorded agreement with the owner for

its purchase his possession is sufficient notice to put others on inquiry, and if they purchase the land from the owner the contract of purchase may be enforced against them. Devlin on Deeds, sec. 760.

In *Everidge v. Martin*, 164 Ky. 497, 175 S. W. 1004, we said:

“Actual possession of land under an executory contract of purchase is always notice to would be purchasers of the fact, that the possessor, who claims to own it, has an interest in the property.”

In the instant case not only was Cash in possession but there is proof that Jones had actual notice of his purchase or interest in the property, hence he, Jones, was clearly a purchaser with notice and as such took subject to the superior rights of Cash.

The weight of the evidence supports the findings of the chancellor. The chancellor ordered the deed to Jones cancelled and directed the commissioner to make a deed to Cash. Riffe, the grantor, died during the pendency of the suit. Cash was further directed to pay Jones whatever sum he had expended in attempting to purchase the property and for any notes he may have executed on account thereof, not exceeding the sum of \$400.00, with interest from January 10, 1918, this being the amount and date of the purchase by Cash.

Satisfied as we are that the conclusion reached by the chancellor is correct it follows that the judgment appealed from must be and is accordingly affirmed.

Hoskins, et al. v. Black, et al.

(Decided December 17, 1920.)

Appeal from Bell Circuit Court.

1. **Mortgages—Failure to Execute Note.**—A provision in a mortgage to secure the payment of a stated indebtedness which provides that the sum is to be paid four months from date, imports a promise to pay, and though the parties failed to execute a note as provided, the mortgagee is entitled to a personal judgment against the mortgagor in a suit for the consideration.
2. **Landlord and Tenant—Rent.**—Though there was no writing, as required by Ky. Stats., sec. 470, evidencing the assignment or transfer of a lease for a longer term than one year, where it is shown that the lease had been considered as cancelled, the assignees who had attorned to the owner, occupied the premises

as tenants at will and were liable for the rent during the period of their occupancy.

3. Landlord and Tenant—Rent.—In a suit instituted by the landlord to collect rent, to which only the original lessees were made parties, it cannot be said those who purchased from the lessee the personalty which was sold, were deprived of their property without due process of law, where they had notice of the suit, were present at the sale, and purchased the property, besides, at the time the suit was filed and the property sold said purchasers were occupying the premises as tenants of the plaintiff, and the rent sued for was for the period covered by their occupancy.

JAMES J. JEFFRIES for appellants.

JAMES M. GILBERT and W. R. LAY for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

In November, 1914, John T. Black and his brother Frank leased from J. A. Ingram and wife the lower floor of a building in Pineville. The lease was for a term of one year, with the privilege of a six year extension. A partition divided the room into two parts, one of which was used as a barber shop, the other as a pool room and pressing establishment. The barber shop was owned by the lessees; the pool room was operated by Frank Black and another brother, called "Crit." The rental for the entire space was \$70.00 per month, \$20.00 of which was apportioned to the barber shop and \$50.00 to the pool room.

In April, 1915, John Black disposed of his interest in the barber shop to his brother Frank. The entire rent was paid to that date and the lessors were notified that John Black had no further interest in the business or lease.

Though Frank had an opportunity to dispose of the pool room outfit to one Gilreath for \$1,000.00, he sold his interest to the appellant, Mrs. Bettie L. Hoskins, mother-in-law of his brother "Crit," for \$600.00. Mrs. Hoskins made the purchase because of her desire to give employment to her son-in-law. To secure the payment of the purchase price Mrs. Hoskins and Crit Black executed to Frank Black a mortgage on the pool room outfit. Though it was the intention of the mortgagors to execute a note evidencing the indebtedness, and it was so expressed in the mortgage, for some reason this was not done. After this sale on September 20, 1915, the pool room was operated by Crit, who, by reason of his

dissolute habits and inattention to business, did not meet with much success in his management of same. The record is silent as to how much he did receive from its operation, as he never accounted to his mother-in-law for any of the receipts.

January 19, 1916, Ingram and wife filed suit against John Black and his brother Frank for the sum of \$237.28, as rent overdue and unpaid to January 5, 1916, and pursuant to an order entered in that case the pool room outfit was sold and it was purchased by W. M. Baker for the sum of \$415.00. Appellants were not parties to this suit, though they had notice of its pendency. Baker testified he made the purchase at the special instance and request of Mrs. Hoskins, who furnished his bond for the purchase price. After the sale the outfit was moved to Harlan, Ky., where it was operated by Baker for Mrs. Hoskins, until it was sold for \$500.00.

In the present suit instituted April 26, 1916, appellees are seeking the recovery of \$600.00, the purchase price of the pool room outfit.

The bank of John A. Black was made a party, it being alleged that appellee Frank Black had borrowed from said bank the sum of \$400.00 and pledged the mortgage as collateral security on said obligation. Upon final submission judgment was rendered against appellants in the sum of \$600.00, subject to a balance due on rent of \$50.44, or a net sum of \$549.56, out of which it directed that the bank be paid the sum due it, with interest. Complaining of this judgment appellants are seeking a reversal on several grounds, which we will take up in the order of their presentment.

It is first urged the court erred in rendering a personal judgment against appellants because the mortgage contained no promise to pay. There would be merit in this argument if it was supported by the record, but we do not think the mortgage is susceptible of that construction. In the second clause of the mortgage it is provided:

"That whereas the parties of the first part have this day purchased from the party of the second part, one pool room and pressing outfit thereafter described and for and in consideration of the sum of \$600.00 to be paid four months from date, which is evidenced by a promissory note of even date, said note bearing interest at the rate of six per cent per annum."

And, again, in another clause we find:

"This indenture is conditioned as follows: That should parties of the first part or any one of them, discharge said note at its maturity which will be on the 20th day of January, 1916, then this mortgage shall be null and void, otherwise to remain in full force and effect."

A promise is an express undertaking or agreement to carry the purpose into effect, a declaration which binds the person who makes it, either in honor, conscience or law, to do or forbear a certain specific act. It is a declaration which gives to the person to whom made a right to expect or claim the performance of some particular thing. 32 Cyc. 633. In *Harrow v. Dugan*, 6 Dana 341, the words "I have borrowed so much money," were held to import a promise to pay. In *Cheatham v. Cheatham*, 6 Ky. Op. 450, a writing executed by an administrator stating there is due a certain person as his share of the estate \$200.00, "to be paid," was properly treated not as an agreement to pay the debt out of the administrator's individual funds but as the evidence of a fiducial liability, and therefore was not affected by the bankruptcy of the administrator individually.

The expression in a writing "to be paid in solvent notes," was held in *Williams v. Sims*, 22 Ala. 512, to be a contract on the part of the maker to pay the sum specified. The words "to be paid" and "payable" were treated as convertible terms.

In Webster's New International Dictionary "promise" is defined as "to engage, to do, give or make; to covenant, to engage, to afford reason to expect."

It is generally held that an ordinary mortgage or deed of trust which contains no covenant for the payment of the debt is not evidence of indebtedness, and, where there is no personal obligation and no personal covenant in the mortgage, the only remedy is against the property mortgaged. 19 R. C. L. 513. It is sufficient to establish a personal liability against the mortgagor if the instrument contains admission of indebtedness on his part, in which event a promise will be implied and a legal liability created. However to create a personal liability by implication the admission of indebtedness contained in the instrument must be sufficiently plain to show that such was the express understanding of the parties. See *Coleman v. Rensselaer*, 44 How. Prac. 368, and note to *Colby v. McClintock*, 68 N. H. 176, in 73 Am. St. Rep. at p. 563.

The rule is well stated in 27 Cyc. 1274, viz.:

"In the absence of a covenant in a mortgage to pay the mortgage debt, the mortgage is not of itself an instrument which imports a personal liability, and no suit can be maintained upon it as a substantive cause of action, the mortgagee's remedy being confined to the land put in pledge. But a personal action may be maintained if the mortgage is accompanied by a note, bond, or other evidence of debt, or if the intention of the mortgagor to assume a personal liability can be made out by a fair implication, or upon the production of evidence of a subsisting debt or claim and of the mortgagor's promise or agreement to pay it, although such evidence is entirely extraneous to the mortgage, and even rests in mere parol."

The words "to be paid," as used in the mortgage, import an undertaking or agreement that the debt would be settled, an obligation to see to its payment, that is, a promise to pay.

It follows from the foregoing that the court did not err in rendering a personal judgment against appellants.

It is next insisted that as there is no written evidence of any assignment or transfer of the lease to appellants it cannot be enforced as to them under the statute of frauds, Kentucky Statutes, section 470, the lease in the meantime having been extended for an additional period of six years. In answer to this contention suffice it to say that when John T. Black disposed of his interest in the barber shop in April, 1915, he notified the lessors he was no longer interested in the lease, and would not be liable for the rent. Furthermore it is testified that some time after that date, and before the lease was extended, inasmuch as the lessors considered John T. Black the only solvent one of the two lessees, they cancelled the lease, treated it as null and void and of no binding effect and declined to recognize the existence of any contract with Frank Black. At the time the present suit was filed the contract was in the possession of Crit Black. It does not appear how he obtained it, nor is this material. Appellants did not occupy the premises under the original lease, which had been abrogated, but were merely tenants at will, and as such liable for the rent during the period of their occupancy.

In the third place appellants contend that while they occupied the premises from the date of their purchase

until the levy of the attachment in the Ingram suit, to-wit: January 19, 1916, they were only liable for one-half of the entire rental, and in no event could this exceed Crit Black's one-half interest in the proceeds of sale of the outfit to Baker. On the other hand appellees claim that when they sold the property to appellants the rent was paid to that date. This is borne out by the testimony of witnesses for both parties, including the attorney and agent for the Ingrams. In the suit for rent, judgment was asked for \$237.28, as the amount due January 5, 1916. The sum sued for at the rate of \$70.00 per month covers a period of approximately 102 days. From September 20, 1915, the date of the sale to appellants, to January 5, 1916, is 107 days; thus we have a verification of the statement of appellees that the rent was paid to the date of sale. Then, too, it is shown that Crit Black made some payments to the Ingrams on account of the rent of the property subsequent to September 20, 1915, and Gilreath, to whom Frank Black sold the barber shop, made payments for his part of the premises to Crit Black after said date. The evidence conclusively shows appellants recognized the Ingrams as their landlords, and they undertook to pay them the agreed rentals.

In the fourth place it is said the sale by Frank Black to appellants and the procurement of the mortgage were fraudulent. There is nothing in the record to support this contention, a fact evidently conceded by appellants since they dismiss this proposition with the mere statement of it.

In the last place it is urged that appellants were deprived of their property without due process of law in that they were not parties to the suit instituted by the Ingrams and in which the pool room paraphernalia were sold. The sole argument on this point consists of a quotation from Freeman on Judgments, which, however, we do not consider *apropos*.

Appellants had notice of the Ingram suit; indeed an order of attachment was served on appellant, Bettie Hoskins, but for what purpose does not appear. The attorney for the lessors was also the attorney for appellant Bettie Hoskins in other matters, and she had consulted him about her interest in the pool room and told him her son-in-law was wasting everything that was coming into the business and she was going to make him straighten up and save sufficient money to pay the rent.

She procured Baker to bid on the pool tables, etc., at the sale; they were purchased in his name for her and she arranged the sale bonds.

Other than the order of sale and distribution of the proceeds no judgment has been entered in the rent suit. Both John T. Black and his brother Frank filed answers denying their liability for the rent, and no further steps were taken in this case. The lower court rendered judgment against appellants for only \$549.56. Our calculation as to the amount of the judgment does not accord with that made by the lower court, but since only the appellants are objecting and the difference, though slight, is in their favor, they have no cause for complaint.

The judgment is therefore affirmed.

Blythe, et al. v. Warner.

(Decided September 21, 1920.)

Appeal from Madison Circuit Court.

Pleading—Exhibits.—Where an exhibit, which is the basis of the action, is filed with the petition, the exhibit will control; and where there is a variance between the exhibit and the pleading the exhibit will prevail.

STEPHEN D. PARRISH for appellants.

G. MURRY SMITH for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

In January, 1903, Larkin Blythe and Dock Francis acquired a small lot in the city of Richmond from Nancy Walker. In the deed the lot is described as follows:

“A certain town lot situated in the city of Richmond known as part of the north half of lot No. 17 in the Ellis addition of said city, lying on the south side and fronting on First street, thirty-nine feet, running back at right angles seventy-six to seventy-nine feet, joining the property of C. H. Rankin, L. Blythe and John Warner.”

In September, 1903, Dock Francis conveyed his one-half undivided interest in the aforementioned lot to his co-owner, Larkin Blythe, and described the property as follows:

"One-half undivided interest in a town lot situated in the city of Richmond, Kentucky, known as part of the north half of lot No. 17, in the Ellis addition to said city, lying on the south side and fronting First street 39 feet, running back at right angles 76 feet to 79 feet, adjoining the property of C. H. Rankin and others."

Following this, on February 10, 1915, Larkin Blythe and wife conveyed the lot to his co-appellants, Dovie Blythe and Fannie Estill, describing the property as follows:

"One town lot No. 17 in the Ellis addition to said city lying on the south side and fronting First street 39 feet running back at right angles 76 feet to 79 feet. Adjoining the property of C. H. Rankin and others, and being the same tract of land conveyed to the party of the first part and Dock Francis by Nancy Hood."

Relying upon their deed Dovie Blythe, Fannie Estill and husband, and Larkin Blythe instituted this action in the Madison circuit court against John Warner to recover possession of a small plot of ground 13 feet by 29 feet adjoining the above described plot, alleging in their petition as amended that the plaintiffs are jointly the legal owners in fee simple of 29 feet linear measure under said inclosure, and 13 feet wide, and that the plaintiff Larkin Blythe is the owner of the remaining four feet linear measure of said strip of land and 13 feet wide, and that the plaintiffs were jointly in possession of said land as hereinbefore pleaded and are now entitled to possession of the same and that defendant holds possession thereof under said inclosure without right. The action is in the nature of one to quiet title. In order to understand this controversy it is necessary to glance at the following map.

The lot covered by the deeds quoted above is embraced within the parallelogram A, B, C, D. This plot of ground was conveyed to Larkin Blythe by the deeds aforesaid and by Larkin Blythe and wife to his two daughters herein. The appellee and defendant below is conceded to own the parallelogram D, E, F, G. The land in controversy is embraced in the dotted parallelogram E, C, H, F. From the allegations of the petition it appears that appellee Warner has the disputed part under fence and in his possession and so held at the time of the commencement of this action, but how long before does not appear. Unless the plaintiffs and appellants

as amended contradicted the pleading, rendered it bad and there was no issue upon which evidence could be offered. After hearing, the court sustained this motion and dismissed plaintiff's action with the following reservation:

"It is ordered that this dismissal shall not be a bar to a future cause of action of the plaintiff, Larkin Blythe." Exceptions were reserved by appellants and appeal granted.

Appellants now contend "that there was error in forcing plaintiffs to submit the case without giving the court the benefit of their testimony either by deposition or orally, and the court having consented to hear it in the latter way should have given the plaintiffs the opportunity of introducing the same on the matters at issue.

If this be an action in ejectment the plaintiffs must rely upon the strength of their own title and not upon the weakness of the title of their adversary, and having alleged title in themselves the plaintiffs were required to establish the same when confronted by a traverse by the defendant. The pleadings of the plaintiffs manifest no title whatever in them except the deeds filed as exhibits to their petition as amended. These exhibits so contradict the pleading as to destroy its effect and establish beyond question the right of the plaintiffs to the parallelogram A, B, C, D, but wholly and entirely excludes their right of claim to the ground in controversy represented by the little parallelogram E, C, H, F.

Under the caption of the "primary issues" in brief of appellant, the question is asked, "Is the parcel of land in question included in the deed exhibited with the petition?" The brief then answers the question by saying: "Appellants' pleadings show that it was and by proof it would have been established that the deed of conveyance so intended and did include that strip." We cannot so read the pleadings as to find a sufficient averment that the land in question is claimed by plaintiffs under any title other than the deeds filed as exhibits and these exhibits contradict the parts of the pleading which attempt to assert title to the parallelogram, E, C, H, F.

The rule is so well established that where an exhibit, which is the basis of the action is filed with the petition

the exhibit controls and is considered against the pleader, and where there is a variance between the exhibit and the pleading the exhibit will prevail, that we feel like it is absolutely unnecessary to attempt to enlarge upon what this court has already said upon that subject. *Covington Gas Light Co. v. Covington*, 101 S. W. 923; *Kalfus v. Davies, Executor*, 164 Ky. 394; *Ky. Mut. Co. v. Logan*, 90 Ky. 364; *Boyd v. Scottish Ins. Co.*, 110 Ky. 722; *Gardner v. Continental Ins. Co.*, 75 S. W. 283.

This is not an action to reform or correct a deed for mistake or fraud. If it were, then the grantors in the deed would be necessary parties. No relief of this kind is sought and it was impossible for the trial court to have considered the evidence which appellants now insist they were ready to offer in support of the allegations of their petition as amended, until the deeds were reformed so as to include the land in controversy, if indeed they were ever intended so to do.

Appellants proceeded upon the idea that they should have been allowed to introduce evidence in support of their claim but if plaintiffs statement of the case which was accepted as true did not entitle him to the relief sought, then there was no necessity of evidence, because evidence could not have aided or strengthened the pleading which for the purpose of the demurrer was taken as true. The exhibits being in contradiction of the allegations of the pleadings prevail, and there was no sufficient averment of ownership of the lands in controversy in the petition and as there was no such averment proof would have been utterly unavailing.

It appears herein that appellants were not entitled to the relief prayed even upon the allegation of their petition as contradicted by their exhibits, and as proof without averment can amount to nothing, it would have been a useless waste of time for the trial court to have heard the evidence, especially in view of the fact that there was no attempt to correct the deed for fraud or mistake. The trial court properly sustained the motion to dismiss the action and the judgment is affirmed.

Judgment affirmed.

Shields, et al. v. Shields, et al.

(Decided October 8, 1920.)

Appeal from Nelson Circuit Court.

1. **Executors and Administrators—Claims of Executors and Administrators—Attorneys' Fees.**—Where an executor suing as such and in his own right attempts to establish against the other devisees his right as a devisee under the will, to nearly all of the estate, and the other devisees employ their own counsel and defeat this claim, he is not entitled to an allowance from the funds of the estate to reimburse him for fees paid to his attorneys, even though some part of the services rendered by his attorneys were such as would have been required by a disinterested executor and for which reimbursement could have been claimed out of the estate.
2. **Wills—Advancements.**—One who claims and takes under a will cannot deny that an amount charged as an advancement by testator to one of his devisees was made by the testator out of funds belonging to him and assert claim to one-half thereof upon proof that the advancement was made out of funds belonging to him and testator jointly.
3. **Executors and Administrators—Allowance.**—An allowance made to an executor for selling land and distributing the proceeds in obedience to the will and a judgment of court was proper.

ERNEST N. FULTON, JOHN A. FULTON and KELLY & KELLY
for appellants.

NAT W. HALSTEAD, OSSO W. STANLEY, and JOHN TODD for
appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming on original appeal and reversing in part on the cross appeal.

This is the second appeal on this case, the former opinion being reported in 185 Ky. 249, but the questions at issue now were not here on the former appeal.

M. T. Shields, as executor of his deceased brother, John W. Shields, and in his own right as a surviving partner and legatee, filed this action against the other heirs and devisees of his testator, asserting his ownership under the will of the entire estate except one farm; and this construction of the will and a settlement of the estate in accordance therewith, he sought to enforce against the defendants. Defendants employing their own counsel contested this claim of plaintiff, M. T.

Shields, and same was denied in both the circuit court and this court.

1. When the case went back to the lower court, plaintiff asked for an allowance of \$5,000.00 to reimburse him for fees paid to his attorneys for services which he claimed were rendered to him as executor. The court allowed him \$4,000.00, and his first contention upon this appeal is that the court erred in refusing to allow him the full amount of the claim. Defendants have cross appealed and contend that the court erred in allowing plaintiff any part of the \$5,000.00 for his attorneys, who, they insist, represented him only in his individual capacity.

While it is true that the suit involved primarily, a construction of the will made necessary by reason of the diverse contentions of plaintiff on the one side and the other heirs and devisees of the decedent on the other, it is also true that the executor and his attorneys took the side of and represented only M. T. Shields as an individual in his effort to procure a favorable and unwarranted construction of the will and settlement of the estate. The duty of the executor and the claim of the individual M. T. Shields were so entirely antagonistic that no attorney could possibly represent both at the same time and in the same litigation. A disinterested executor necessarily would have brought suit for a construction of the will against all of the heirs and devisees, calling upon them unaided by him or his counsel to fight out among themselves their adverse contentions. Under such circumstances an executor would have been entitled to an allowance for his attorneys, but in so far as this litigation is concerned, in which most of the services are alleged to have been performed, no such question is presented. The services of counsel for plaintiff were worth \$5,000.00 as is conclusively proved, but nearly all of them were rendered to M. T. Shields individually and not as executor. That some part of these services would have been required by a disinterested executor is wholly beside the question, since there was no such executor in this litigation. Should then defendants, who to protect their interests under the will were required to employ and pay their own counsel by reason of the hostile and unwarranted attitude of the executor, be required to pay any part of his attorneys' fee in this action? A mere statement of the proposition sufficiently exposes

its injustice and inequity. Under somewhat analogous circumstances, this court has refused to make litigants pay any part of an attorney's fee of which they might have been but were not beneficiaries. See *Whitehead v. Fulton*, 187 Ky. 718, and cases there cited.

In *Goddard's Ectx. v. Goddard, et al.*, this court in response to a petition for rehearing reported in 164 Ky. 41 held it was error to allow the executrix attorney fees where the suit ostensibly for a construction of the will was in fact for the purpose of enforcing a claim asserted in her own behalf against the other beneficiaries. To the same effect are *Robbins' Exor. v. Robbins*, 8 Ky. Law Rep. 54; *Wakefield & Beard v. Gilliland's Admr.*, 13 Ky. Law Rep. 845; *Wilson, et al. v. Wilson, et al.*, 188 Ky. 53, 11 R. C. L. 236.

We are therefore of the opinion the court erred in allowing the executor anything for attorney's fees in so far as this litigation is concerned, and as the allowance made included such services it must be reversed. The evidence shows however that the executor performed some necessary services for the estate in which attorneys' services were required and had, aside from this litigation, such as probating the will, payment of inheritance taxes, etc., for which he is entitled to allowance for attorney's fees expended, but it does not appear what such services were reasonably worth as the evidence as to value was of the entire service performed by his attorneys including this litigation. Upon a return of the case the executor should be permitted to prove the reasonable value of services rendered him as executor by his attorneys outside of this litigation and to that extent he will be reimbursed by allowance out of the estate on final settlement.

2. The next complaint of appellant is that the court erred in refusing his claim to one-half of \$1,400.00 and interest deducted from the share of Mrs. Kolb, a sister of decedent and appellant. The will gave Mrs. Kolb one-eighth of the proceeds of testator's home farm and by inheritance she was entitled to one-ninth of the rest of his property, of which he died intestate; but by the fifth clause of the will it was provided that this \$1,400.00 and interest should be "Deducted from any amount which may come to my sister Ella Kolb." Necessarily then, by the terms of the will this amount had to be deducted from what was coming to her out of testator's

estate, whether from the proceeds of his home farm or from his half of the partnership business; and, when so deducted, went back, of course, into his estate for the benefit of those entitled thereto and not to the partnership property. This charge against Mrs. Kolb was not therefore a chose in action as appellant contends, or property which testator or the partnership owned at his death, but was simply an expression of his intentions with reference to an advancement made by testator out of his own funds, during life. At least it is clear testator so treated and disposed of it, and appellant who claims and takes under the will one-eighth of this sum deducted from Mrs. Kolb's share, and much else, could not claim one-half thereof against the will, even upon proof that the advancement had been made by testator out of partnership funds.

That item five of the will in no wise represented or dealt with property owned by decedent at his death is also conclusive of the fact that statements in the judgment of the lower court and the opinion of this court on the former appeal, describing the property which belonged to decedent and to the partnership at his death, did not refer to or include this charge against Mrs. Kolb.

The question with which we are now dealing was not before or considered by the circuit court or this court in the former judgment and appeal therefrom, and hence is not *res judicata* as is contended by counsel.

3. Appellees upon their cross appeal also complain of the allowance to the executor of \$794.05 in commissions for selling testator's home farm and distributing the proceeds, but this was not error since these services were performed by the executor in obedience to the will and judgment of court and all parties received the benefit of same, for which they would have had to pay a like fee and in the same proportions no matter who performed the services.

Wherefore the judgment is affirmed on the original appeal and reversed on the cross appeal upon the question of attorney's fees for further proceedings with reference thereto as herein indicated.

Marshall v. Glover.

(Decided November 16, 1920.)

Appeal from Fulton Circuit Court.

1. Assault and Battery—Provocation—Mitigation of Damages.—Under section 73a of the Kentucky Statutes the defendant in an assault and battery case may plead as a defense to the claim for punitive damages, provocation preceding the assault and battery.
2. Assault and Battery—Provocation—Sufficiency of.—Under this statute the provocation that caused the defendant in an assault and battery suit to bring on the difficulty may arise out of recent abuse or misbehavior by the plaintiff towards the defendant or some member of his family.
3. Assault and Battery—Threats—Competency of.—It is admissible for the defendant in an assault and battery suit where self defense is pleaded to introduce evidence of previous threats made by the plaintiff against him.
4. Assault and Battery—Threats—When Party May Testify as to.—It is competent for the defendant in an assault and battery case to testify that threats were communicated to him before the difficulty and to give the names of the persons who furnished the information, but if he wants to prove the nature of the threats he must introduce the witnesses to whom the threats were made and who communicated them to him and should not be permitted to relate what these witnesses told him unless he shows they are dead or their evidence cannot be procured.
5. Assault and Battery—Character of Plaintiff.—In an assault and battery suit it is admissible for the defendant to show the violent, quarrelsome character of the plaintiff.

HESTER & HESTER for appellant.

W. J. WEBB, W. B. AMBERG and C. N. LANNON for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Affirming.**

The appellant, Marshall, brought this suit to recover damages growing out of his alleged unlawful, willful and malicious shooting and wounding by the appellee Glover. On a trial of the case the jury returned a verdict for Glover and Marshall appeals.

In his answer Glover, after traversing the averments of the petition, set up that: "At the time and place, and on the occasion mentioned and set out in the petition, the plaintiff unlawfully threatened and assaulted the defendant by advancing on him with threatening words

and manner and attempted a personal attack upon him, and the defendant was in danger of suffering bodily harm at the hands of the plaintiff, and that he in good faith believed, and had reasonable grounds to believe, that he was then and there in danger of bodily harm being inflicted upon him by the plaintiff, and that in his own necessary self-defense, and to protect himself from said danger, he shot the plaintiff, but in doing so he did no more or used no more force than was necessary or appeared to him in the exercise of a reasonable judgment to be necessary to protect himself from said injury at the hands of the plaintiff, and this is the shooting and wounding of which complaint is made in the petition, and what he did on said occasion was in his own necessary self-defense, upon which he pleads and relies herein."

And further pleaded that "a few days before the shooting mentioned in the petition the plaintiff had come upon the defendant's premises and cursed and abused the defendant's child, and when defendant met him on the said occasion he inquired of plaintiff why he had abused his child, whereupon the plaintiff, as alleged in his original answer, threatened and assaulted him in the manner therein set out."

On a trial of the case Glover testified that the personal relations between himself and Marshall had been unfriendly for some years; that he had forbidden Marshall to go on his premises or farm; that the day before the shooting he was told by his son Newman that Marshall shortly before this had come on his farm to look for hogs and while there had cursed and abused his son Newman and made insulting remarks about himself; that the day after he received this information from his son he met Marshall on the street in Union City, Tennessee, and asked him what he meant by cursing his son.

He then related what took place as follows: "He (Marshall) said: 'Come back in this alley and we will settle this now,' and he started toward me and I pulled the pistol out and I said, 'Dick, don't come any further or I will shoot you,' and I started to put it back in my pocket and he started toward me again and I shot. I didn't hit him; didn't want to, and when I did that he had his hand in his pocket and pulled it out and he kept coming on me and I was retreating and I shot him then and he stopped the instant I shot. . . . I had re-

treated back up north, I don't know just how far, but I was anywhere from ten to twenty-five feet north of where I was when I started."

He also testified that when he shot Marshall he was advancing on him in a violent and threatening manner and he believed it was necessary that he should shoot him to protect his own life.

And further introduced evidence to show that Marshall was a large, vigorous, dangerous and quarrelsome man, and it appears without contradiction that Glover was delicate and crippled.

He was also asked concerning threats that had been made against him by Marshall before the shooting and testified that Wright, Frazier and Rogers had told him that Marshall had said to each of them in a violent way that if ever he crossed his path he would beat him to death.

Newman, the son of Glover, testified that a few days before the shooting Marshall came over to their farm looking for some hogs, and after going about the place and not finding them went out in the road, but immediately returned into the field and advanced on him in a threatening and offensive manner, making at the same time threats as to what he would do to his father if he was there. He also said that when he first saw his father after this he told him what Marshall had said and the violent manner in which he had acted.

Wright was introduced as a witness and testified to the threats made by Marshall against Glover and that he had communicated these threats to Glover before the shooting, but neither Frazier nor Rogers was introduced as a witness, and the only evidence as to the alleged threats made in their hearing by Marshall was given by Glover, who related what they had told him.

At this point it should be said that counsel for Marshall objected to the introduction of evidence showing the violent, dangerous and quarrelsome habits and disposition of Marshall and to the evidence given by Glover as to the threats made against him by Marshall.

Marshall, testifying in his own behalf, admitted the unfriendly and hostile relations existing between himself and Glover, but was not inquired about nor did he testify concerning the threats against Glover testified to by Wright or those related by Glover as coming from Frazier and Rogers. Although it should be said that in

answer to the question whether he had made any threats against Glover at the time he was shot he said: "I never made any threats at him or about him or to him in my life." He also denied that he had threatened, cursed or abused the son of Glover, further saying that the boy had without cause cursed and abused him.

In relating the circumstances of the shooting he said: "I saw him on the outside of the walk and sorter walking along north, and when he saw me he stepped out to the side of the walk. I paid no attention to it; I didn't think of any trouble, but when I come even with him going south he turned around and said: 'What in the hell is this you were saying to Newman, my boy,' and at the same time he commenced fumbling a gun; of course I could see the gun, and I said I didn't say anything to your boy to amount to anything and certainly nothing to bring any trouble over, and he said you are a liar or damned liar or God damned liar, I don't know which, and I said: 'Jimmie, let's don't have any trouble, this isn't anything to have trouble over; let's go away and settle it some other time; and he said: 'You damned — we will settle it now,' and all this time I was seeking a way to get away from him.

"I was angling around to get out of his way. I saw he was going to pull his gun—he was at that time trying to get his gun out. I was probably two steps from him, angling around trying to save myself and get out of his way. I was trying to get down there and get in that hardware store, and at that moment he fired; he held the gun straight and never varied it down or up and fired." He further testified that he did not follow up Glover or advance on him in a threatening, violent or offensive manner or at all.

It should be further said that the statements of Marshall and Glover as to what transpired at the time of the shooting were corroborated by witnesses introduced for them respectively.

From this brief account of the evidence it will be seen that according to the theory of Marshall the shooting by Glover was entirely unprovoked, while according to Glover's theory he shot Marshall in his necessary self-defense.

It is also clear that there was sufficient evidence to have sustained a verdict for either party, and so there is no ground for the assertion that the verdict was

flagrantly or at all against the evidence. The law of the case having been submitted correctly it was simply a question with the jury which set of witnesses they would give the most weight to and they decided in favor of Glover and his witnesses.

In section 73a of the Kentucky Statutes it is provided that: "In all civil actions for damages inflicted by an assault, or by an assault and battery, the defendant shall have the right to plead as a defense to the claim for punitive damages, and to introduce in evidence in mitigation of damages, any matter of provocation which preceded the assault or assault and battery. If the matter of provocation prompted the assault or assault and battery, and was of a nature as to cause a person of ordinary prudence and judgment to take the action taken by the defendant."

It was under the authority of this statute, the pleading of Glover setting up the provocation caused by the abuse of his son and the evidence introduced in support of this pleading that the court in the course of the instructions told the jury that if they believed from the evidence "that plaintiff gave to the defendant such provocation to assault and shoot plaintiff as would cause an ordinarily prudent man under like or similar circumstances to assault and shoot the plaintiff, and that such provocation, if any, did prompt defendant to assault and shoot plaintiff, you may consider such provocation, if any, in mitigation of the punitive damages, if any, which you may find for the plaintiff."

And we think the information that Glover received from his son as to the manner in which Marshall behaved at the time he met his son in the field was sufficient to authorize, under the statute, the instruction the court gave. *Renfro v. Barlow*, 131 Ky. 312.

The scope of this statute should not be limited to provocation given directly to the defendant preceding the assault or assault and battery. It is broad enough to cover provocation caused the defendant by abuse or gross behavior towards members of his family. The purpose of the statute was, as said in the *Renfro* case, to change the old rule that excluded evidence of provocation occurring prior to the assault and battery complained of, and it is not to be doubted that the provocation contemplated by the statute would surely be given by an assault upon or abuse of a man's child.

So that when the assault and battery is induced by previous provocation growing out of abuse of or misbehavior toward the defendant himself or a member of his family, and it is of such a nature as to cause a person of ordinary prudence and judgment to resent it, it may be pleaded under the statute in mitigation of punitive damages.

In this case, however, although the evidence authorized the instruction, it cannot be said that the provocation that immediately resulted in the shooting was caused by what Marshall said to the son of Glover, because, according to the testimony of Glover and his witnesses, he was influenced to shoot Marshall on account of the threatening and violent manner in which he was approached by Marshall after he had inquired of him concerning the quarrel with his son. It was therefore proper for the court to instruct the jury as it did that Glover had the right to shoot Marshall in his self-defense unless they believed Glover brought on the difficulty by the use of such acts or language as were reasonably calculated to provoke an assault on himself by Marshall, and also to give the instruction permitting the jury to consider, in mitigation of damages, the provocation caused by what occurred between Marshall and the son of Glover.

It is complained by counsel for Marshall that the court committed error in admitting evidence that Marshall was a violent, turbulent, quarrelsome man, but evidence that the plaintiff possesses these traits of character is always admissible in actions for assault and battery where the defendant justifies on the ground of self-defense. *Davenport v. Silva*, 265 Mo. 543, 1916a L. R. A. 1240 and note; *Payne v. Com.*, 1 Met. 370; *State v. Feeley*, 194 Mo. 300, 3 L. R. A., U. S. 351 and note.

It is further insisted that prejudicial error was committed against Marshall by permitting Glover to testify as to threats by Marshall against him some months before the difficulty took place. It will be recalled that Glover, over the objection of counsel for Marshall, was permitted to testify as to threats made by Marshall against him to Wright, Frazier and Rogers although Frazier and Rogers were not introduced as witnesses.

It has been frequently held competent in criminal and assault and battery cases where the homicide or assault and battery is justified on the ground of self-defense for the defendant to introduce evidence of previous

threats made against him by the plaintiff for the purpose of illustrating who commenced the difficulty leading to the homicide or assault and battery, and to show his state of mind when and immediately before the homicide or assault and battery took place and the apprehension he entertained that the plaintiff would, in fulfillment of his threats, do him some violence.

Illustrative cases on this subject are: *Rochester v. Anderson*, 1 Bibb 428; *Waters v. Brown*, 3 A. K. M. 558; *Cornelius v. Com.*, 15 B. M. 539; *Miller v. Com.*, 89 Ky. 653; *Hart v. Com.*, 85 Ky. 78; *Moran v. Vicroy*, 24 Ky. Law Rep. 2415.

Nor is the objection that the threats, made about one year prior to the assault and battery complained of, were too remote from their occurrence well taken. These threats were sufficiently near the difficulty to be admissible and their weight was for the jury. *Abbott v. Com.*, 24 Ky. Law Rep. 148.

Especially is this true on account of the continued state of bad feeling that had existed between Marshall and Glover for some three years prior to the difficulty. We think that when a continued state of ill feeling is shown to exist threats made at any time during its existence are competent. On the other hand, threats made an unreasonable length of time before the date of the transaction under investigation would not be admissible if it appeared that, after the date of these alleged threats, friendly relations had continuously existed between the parties up to the time of the assault and battery complained of.

We think, however, the court fell into error in permitting Glover to relate the nature of the threats communicated to him by Wright, Frazier and Rogers.

It was competent for Glover to testify that threats made by Marshall against him had been communicated to him before the difficulty and to give the names of the persons who furnished the information, but not more. If the defendant or the plaintiff, as the case may be, wants to prove threats he must introduce the witnesses to whom the threats were made and who communicated them to him and should not be permitted to relate what these witnesses told him. *Hutts v. Shoaf*, 88 Ind. 395. If a party to a suit could, without introduction of witnesses, relate in detail or substance the threats communicated to him this would enable him to support his case by

purely hearsay evidence and leave the other party unable, in the absence of the witnesses who heard the threats, to meet the issue.

An exception, however, to this rule is found when the witness who heard and communicated the threat is dead at the time of the trial. *Carico v. Commonwealth*, 7 Bush 124. Another exception should be made when the witness who heard the threat and communicated it cannot be produced or his deposition secured, and in such a case upon a proper showing of these facts the party may give in evidence the threats the absent witness communicated to him.

But in this case it was not made to appear that the evidence of Frazier and Rogers could not have been obtained, and therefore the evidence of Glover in relating what they said to him was incompetent.

As we have said, Glover should not have been permitted to testify as to the nature of the threats alleged to have been communicated to him by Wright, Frazier and Rogers, but the error in this respect, so far as the threats communicated by Wright are concerned, was clearly not material, because Wright when put on the witness stand testified that he told Glover before the difficulty what Glover testified he had said to him.

The remaining question is: was the error in permitting Glover to relate the threats communicated to him by Frazier and Rogers of sufficient importance to constitute reversible error? Under all the circumstances of the case we do not think so.

The evidence on this point by Glover was as follows:

"Q. Previous to this shooting state whether any one communicated to you the facts with reference to your life being threatened by Mr. Marshall? A. Yes, sir. Q. What was it? A. I had communication from Jim Wright, Marion Frazier and Thelbert Rogers. Q. What was it Wright told you Marshall threatened to do? A. He said if he ever caught me on his place that I was the damnedst thief he ever saw and if I ever crossed his path he would beat hell out of me. Q. What did Marion Frazier say? A. He said I had given him some trouble and he was going to beat hell out of me. Q. What did Thelbert Rogers say? A. That I was putting some of his hogs up and I was starting a big war and he was going to beat hell out of me."

It will be noticed that all these threats were expressed in substantially the same words, and that those alleged to have been communicated by Frazier and Rogers could not have had much weight with the jury in making up their verdict is made quite clear by the understanding that Glover did not shoot Marshall on account of what his son Newman or Wright or Frazier or Rogers may have told him but because he believed his life to be in danger and that it was necessary he should shoot in his self-defense.

It is further worthy of notice that when Marshall was put on the witness stand he was not inquired of about the threats alleged to have been made by him to Wright, Frazier and Rogers, nor did he on his own motion deny making any of them unless it could be said that his answer, "I never made any threats at him or about him or to him in my life," to the question asked if he made any threats to Glover at the time the difficulty took place could be construed as a denial of the previous threats. And this is very doubtful. At any rate we are well satisfied that the admission of this incompetent evidence was not prejudicial to the substantial rights of Marshall.

Wherefore the judgment is affirmed.

Cincinnati, New Orleans & Texas Pacific Ry. Company v. Depot Lunch Room.

(Decided November 19, 1920.)

Appeal from Boyle Circuit Court.

1. Landlord and Tenant—Termination of Lease.—A lease dated March, 1912, which provides that it shall be for a term of five years from and after the completion of a building to be erected on lessor's premises does not expire until five years from the date of completion.
2. Landlord and Tenant—Termination of Lease.—Under Ky. Stats., sec. 2295, in a tenancy for a year or more, expiring on a certain day, if the tenant does not abandon the premises, or is not turned out of possession, or does not make a new contract within ninety days after the expiration of the term, he remains thereafter as a tenant by sufferance from year to year, and no legal proceedings to evict him are maintainable unless instituted within ninety days of any anniversary of the expiration date.

3. Landlord and Tenant—Tenant by Sufferance.—Where a lease by its terms expires five years after the completion of the leased building, which was August, 1912, and no steps were taken to evict the tenant within ninety days from the same month in 1917, the tenant remained such by sufferance for another year and suit instituted August 2, 1918, was not premature.
4. Frauds, Statute of—Contracts Within Statute.—A verbal contract or lease of real estate for a term of five years is within the statute of frauds, Ky. Stats, sec. 470, which provides that no action shall be brought to charge any person upon any lease on real estate for a term of more than one year, or upon any contract not to be performed within one year from the making thereof, unless the contract, agreement or assurance or some memorandum thereof be in writing signed by the party to be charged therewith.
5. Landlord and Tenant—Acceptance of Rent After Expiration of Term.—Acceptance of rent after the expiration of the original lease where it is recited that it is received pursuant thereto does not act as a renewal or extension of the original lease, which was for five years, the acceptance of rent after the expiration of the contract term being entirely consistent with the rights of both parties under Ky. Stats., sec. 2295.

CHAS. H. RODES, NELSON D. RODES, EDWARD COLSTON
and JOHN GALVIN for appellant.

BAGBY & HUGUELY, JOHN S. OWSLEY and E. V. PURYEAR
for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

March 6, 1912, appellant on the one part and M. O. Lowell and C. T. Lowell on the other, entered into a contract by the terms of which appellant agreed to erect a one story building on its premises south of its passenger depot at Danville, Ky., to enable the Lowells to conduct a restaurant in said building.

At the time of the present litigation the rights under this contract were by successive assignments held by appellee. The lease was for a term of five years from and after the completion of the building, a rental of \$50.00 to be paid monthly in advance. The building was completed about August 1, 1912, continuously from which date a restaurant has been conducted in said building by the Lowells and their assignees.

Alleging appellees were wrongfully withholding from it the possession of said building appellant instituted this action to obtain the possession of its property and for damages for the retention thereof.

June 29, 1918, appellant served notice on appellee to vacate the premises by July 31, 1918. An answer made up the issues. Upon a trial of the action the court overruled appellant's motion for a directed verdict but sustained a like motion made by appellee, and this appeal is to reverse the judgment entered pursuant to that ruling.

Geo. T. Weatherford and Dr. T. R. Griffin, two of appellee's stockholders, testified in substance that in the summer of 1916, Griffin went to Weatherford who at that time was postmaster at Hustonville, and urged him to buy an interest in the lunch room, informing him that W. T. Caldwell, appellant's superintendent, said there would be no difficulty in securing a renewal of the lease for an additional five years. Thereafter Weatherford went to Danville, and in company with Griffin, called upon Mr. Caldwell, who told them there would be no trouble about renewing the lease. Acting upon this assurance Weatherford purchased an interest in the lunch room. On subsequent occasions Caldwell was in the building and made suggestions about different arrangements and changes therein. In April, 1917, when Caldwell was asked about the lease he informed Dr. Griffin it had been sent to the company and he supposed it had gotten pigeonholed, and suggested that either Griffin or Weatherford go to Cincinnati to see about it. These witnesses also testify that Horace Baker, appellant's general manager, told them he thought there would be no trouble about securing a renewal of the lease. Both Caldwell and Baker deny having given these assurances.

It is shown that Superintendent Caldwell had no authority to execute leases or renewals thereof. The original lease was signed on behalf of appellant by its general manager, Baker.

Appellee continued to make its monthly payments up to July, 1918, pursuant to vouchers presented by the company; payments tendered after the last named date were refused by the company.

On behalf of appellee it is contended: First that the suit was premature. This is on the theory that since the contract was dated in March, 1912, it expired by its terms the same month in 1917, and therefore this action was not maintainable at the time suit was instituted. Under Kentucky Statutes, section 2295, which provides, in substance, that if by contract a term or tenancy for

a year or more is to expire on a certain day the tenant shall abandon the premises on that date unless by express contract he secures a right to remain longer. A tenant holding over without such contract shall not thereby acquire any right to hold or remain on the premises for ninety days after said date and the possession may be recovered without demand or notice if proceedings are instituted within said time. But if proceedings are not instituted within ninety days then none shall be allowed until the expiration of one year from the expiration of the term or tenancy and so from year to year until the premises are abandoned or the tenant is turned out of possession or makes a new contract.

If the term expired in March, 1917, appellee could have been expelled from the premises by proper legal proceedings instituted within ninety days thereafter, but failing to take steps to evict appellee within this period it would have had the right under the statute to remain for another year, to-wit, until March, 1918, and thereby become a tenant by sufferance from year to year. *Mendel v. Hall, etc.*, 13 Bush 232. It would follow on this theory that an action instituted more than ninety days after March, 1918, though within the year would be premature. However, the contract between the parties does not sustain appellee's contention as to the term or the date of expiration, inasmuch as it is expressly stipulated that appellant was to construct the building and the tenancy was for a term of five years from and after the completion of said structure. This was August, 1912, hence the term did not expire until August, 1917, and when no steps were taken to evict appellee within ninety days after August, 1917, it acquired the right under the statute to remain until August 1, 1918.

It is next contended that by reason of the alleged assurance of its officers appellant is estopped from denying the contract had been extended or renewed. Relying on the general manager and superintendent made the promises as claimed does not help appellee. The contract involves the leasing of real estate for a term of five years and as such it was within the statute of frauds. Kentucky Statutes, section 470, provides that no action shall be brought to charge any person " . . . 6. Upon any contract for the sale of real estate, or any lease thereof for a longer term than one year; nor, 7. Upon any agreement which is not to be performed within one

year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; . . . ”

Appellee's right to possession is founded on a lease of land for a five year period, a contract clearly within the statute, since the renewal or extension which it is claimed appellant's officers agreed to is not in writing. Mere verbal assurances are insufficient to sustain appellee's contention.

The fact that the company received rentals for each month until August, 1918, would not take the case out of the statute. In each statement and receipt for rent reference was made to the original contract of March 8, 1912. Payments after August, 1917, were not made pursuant to a new lease nor to any renewal of the old one. The acceptance of rent after the expiration of the original lease was entirely consistent with the rights of both parties as they existed under Kentucky Statutes, section 2295.

Instead of sustaining appellee's motion for a directed verdict a similar motion made by appellant should have been sustained.

Wherefore the judgment is reversed for further proceedings consistent herewith.

Chesapeake & Ohio Railway Company v. Honaker, By, Etc.

(Decided November 26, 1920.)

Appeal from Pike Circuit Court.

- Railroads—Injuries to Persons on or Near Tracks—Negligence—Contributory Negligence—Questions for Jury.—In an action against a railroad for injury to a child at a place where the company owed the duty to maintain a lookout and to give reasonable warning of the train's approach, evidence examined and questions of negligence and contributory negligence held for the jury.
2. Appeal and Error—Railroads—Injuries to Persons on or Near Tracks—Trial—Instructions.—Where defendant did not offer a qualification of a given instruction or another instruction pre-

senting the theory that defendant was under no duty to warn plaintiff of the approach of the train if plaintiff knew of its approach, defendant cannot complain of an instruction in the usual form telling the jury that it was the duty of defendant to give reasonable warning of the train's approach where there was substantial evidence that plaintiff did not know of its approach, although there was some evidence to the contrary.

3. Railroads—Injuries to Persons on or Near Tracks—Trial—Instructions.—In an instruction telling the jury that if they believed from the evidence that the plaintiff, after receiving or having warning or notice of the train's approach, ran upon the track or so close to it that the injury to him could not have been averted by those in charge of the engine, if reasonably sufficient lookout had been observed, they should find for the defendants, the use of the words, "if reasonably sufficient lookout had been observed," was proper where there was evidence tending to show that plaintiff went upon the track so far ahead of the train that a proper lookout would have enabled defendant to have warned him of the danger, or to have stopped the train in time to have prevented the accident.
4. Railroads—Collisions—Negligence—Last Clear Chance.—Where the accident occurs at a place where the defendant is under the duty to maintain a lookout, plaintiff's contributory negligence in going upon the track with knowledge of the approach of the train will not defeat a recovery if the defendant, by the exercise of ordinary care, could have discovered his peril in time to have prevented the injury.
5. Railroads—Injuries to Persons on or Near Tracks—Trial—Instructions.—An instruction telling the jury that, although they believed from the evidence that the defendant was guilty of negligence in the operation of the train and in the injury to plaintiff, yet, if they should further believe from the evidence that plaintiff, when at a safe distance from the track, knew of the approach of the train and with this knowledge went upon the track and was injured, he assumed the risk of the injury, was properly refused because it relieved defendant of all liability even though it might have discovered plaintiff's peril in time to have avoided the injury by the exercise of ordinary care.
6. Appeal and Error—Railroads—Injuries to Persons on or Near Tracks—Instructions.—It is not error to refuse an instruction where there is no substantial evidence on which to base it.
7. Appeal and Error—Railroads—Injuries to Persons on or Near Tracks—Instructions.—In an action for personal injuries occurring at a place where a lookout duty was owing, it was not error to refuse an offered instruction telling the jury that if they believed from the evidence that the fireman was engaged in coal-ing his engine, the defendant was not liable because of his failure to keep a lookout, it being the settled rule in this state that in cities, towns and thickly settled communities where a lookout duty is required, and the physical conditions are such that a lookout

by the engineer alone is not effective, then it is the duty of the fireman to keep a lookout unless engaged in the performance of a duty no less urgent and necessary for the protection of human life, and the putting in of coal is not such a duty.

8. Damages—\$15,000.00 for Loss of Foot Not Excessive.—Considering the increase in the cost of living and the decrease in the purchasing power of a dollar, a verdict for \$15,000.00 for injury to a seven year old boy, resulting in the loss of his foot, was not excessive.

WORTHINGTON, COCHRAN, BROWNING & REED and KIRK & KIRK for appellant.

HAMILTON & POLSGROVE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,
COMMISSIONER—Affirming.

James Marvin Honaker, an infant suing by his guardian, J. B. Honaker, brought this action against the Chesapeake & Ohio Railway Company and its conductor, engineer and fireman, to recover damages for personal injuries. From a verdict and judgment in favor of plaintiff for \$15,000.00, the railway company appeals.

The accident occurred in Pikeville, a town of about 3,000 inhabitants, on the morning of March 17, 1917. The tracks of the railway company run along the northern edge of the town and there are a number of dwelling houses and other buildings on the north side of the right of way. The station is located on the south side of the tracks. Division street, which runs north and south through the town, ends on the south side of the right of way, and at that point the engine stopped on the day of the accident. There are also two tracks at that point with a pathway between them. On the south side of the south track there is another path near the end of the ties. These paths, as well as the tracks, are used by the public in large numbers in going to and from schools and other places. The accident occurred at a point about 225 feet west of Division street, and 270 feet west of the depot. At that point the two tracks come together, and the middle path ends. Plaintiff, his brother and Quincy Milam were *en route* home for the purpose of getting lunch. When they passed the depot the train was standing still. They then ran down the right of way in the direction of their home. When the train started the boys were then

from 50 to 60 feet away, and according to plaintiff and his companions, plaintiff was several feet ahead of the other boys. One of the witnesses for plaintiff says that the boys looked back when the train started, and that plaintiff was behind the other two boys. Upon reaching the end of the path, plaintiff went upon the main track. There was substantial evidence that no warning of the approach of the train was given, and that the fireman was putting in coal at the time. Plaintiff claims that he did not know of the approach of the train until it was nearly on him, and that he caught his foot in the frog. While there was some evidence that when plaintiff came on to the main track the engine was only five or ten feet away, the weight of the evidence is that the train was then 35 or more feet away. There was also proof that the train was going at about five miles an hour, and could have been stopped within a distance of from 20 to 30 feet. The fireman says that he put in some coal at the crossing, and after passing some boys, began again to put in more coal. He did not see or know anything of the accident. The engineer claims that there was a slight curve at the point of the accident, and that his view was obstructed by the engine. He also says that he did not know anything of the accident until he reached the next station.

There was no error in refusing defendant's request for a peremptory instruction. It is conceded that the accident occurred at a place where it was the duty of the defendant to maintain a lookout and give reasonable warning of the train's approach. There was substantial evidence that no warning was given, and that the fireman was engaged in putting in coal, besides certain circumstances tending to show that the engineer himself was not keeping a lookout. There was also evidence tending to show that defendant's failure in these respects was the proximate cause of plaintiff's injury. If a proper warning had been given, the child might not have gone on the track, and there are circumstances from which it could be reasonably inferred that, even after plaintiff went on the track, the accident could have been avoided by the exercise of ordinary care, if a proper lookout had been kept. Hence, the questions of negligence and contributory negligence were for the jury.

In addition to other instructions not material, the court gave the following instructions:

1. "The court instructs the jury that if they believe from the evidence the tracks and premises of the defendant, Chesapeake & Ohio Railway Company, at the point in question, were habitually used by the public at the time the plaintiff was injured, and the presence of persons on the track at that time and place was reasonably to be expected, then it was the duty of the defendant railway company's servants in charge of the engine in question to give reasonable warning of its approach by blowing the whistle or ringing the bell, and to keep a reasonable lookout in front of the engine as it moved. It was incumbent on the plaintiff to exercise reasonable care to look out for approaching trains and to keep out of the way. And, if you believe from the evidence that reasonable warning of the approach of the engine was not given or reasonable lookout was not kept, and by reason of this plaintiff's foot was run upon or other parts of his body injured by said engine while he was exercising reasonable care to discover and keep out of the way of the engine, you should find for the plaintiff. Unless you so believe and find, you will find for the defendants.

2. "If the jury believe from the evidence that the plaintiff after receiving or having warning or notice of the approaching engine ran upon the track or so close to it that the injury to him could not have been averted by those in charge of the engine, if reasonably sufficient lookout had been observed, you should find for the defendants.

4. "If you believe from the evidence that the plaintiff himself was negligent in the sense that he failed to exercise the degree of care for his own safety usually exercised by persons of his age, experience, intelligence and discretion, and by reason of such failure he helped cause or bring about the injuries of which he complains, and that he would not have been injured but for such failure, then the law is for the defendant and you should so find."

It is suggested that instruction No. 1 is erroneous in that it contained no qualification to the effect that if the fireman was engaged in putting in coal, he was not necessarily negligent in failing to keep a lookout. This phase of the case we shall discuss in another connection.

Another contention is that there was evidence that plaintiff knew of the approach of the train, and that the

instruction should have been modified so as not to place upon defendant the absolute duty to give warning of the approach of the train, if the jury believed from the evidence that plaintiff knew of its approach. The instruction is in the usual form, and we have never held it error to give an instruction in that form, where there was substantial evidence tending to show that plaintiff did not know of the approach of the train. In order for the jury to find for plaintiff, it was necessary for them to believe from the evidence not only that there was a failure to warn, but that such failure was the proximate cause of the injury. Defendant had the right to argue that the jury could not find for plaintiff under this instruction because there was evidence that plaintiff knew of the approach of the train, and if this was true, defendant's failure to warn was not the proximate cause of the injury. If not content to rest its case on this argument, it should have offered a qualification of the given instruction or another instruction presenting the theory that defendant was under no duty to warn the plaintiff of the approach of the train, if plaintiff knew of its approach. Not having done this, it cannot complain that no such qualification was contained in the given instruction.

Instruction No. 2 is attacked because of the use of the words, "If reasonably sufficient lookout had been observed." It is argued that if plaintiff knew of the coming of the train and went upon the track, his own contributory negligence caused the accident, and no recovery should have been allowed. This position would be sound if the uncontradicted evidence had shown that plaintiff went upon the track so close to the engine that his peril could not have been discovered in time to have prevented the injury by the exercise of ordinary care. However, the evidence on this question was conflicting. If certain witnesses are to be believed, plaintiff went on the track when the train was thirty-five or more feet away, and if this be true, a proper lookout would have enabled the defendant's servants to have warned him of the danger, or to have stopped the train in time to have prevented the accident. Hence, the case falls within the well known rule that where the accident occurs at a place where the defendant is under the duty to maintain a lookout, plaintiff's contributory negligence in going upon the track with knowledge of the approach of

the train will not defeat a recovery if the defendant, by the exercise of ordinary care, could have discovered his peril in time to have prevented the injury. C. & O. Ry. Co. v. Banks' Admr., 144 Ky. 137, 137 S. W. 1066.

Complaint is made of the court's failure to give instruction "D," which is as follows:

"The court instructs the jury that although they may believe from the evidence that the defendants were guilty of negligence in the operation of the train and in the injury of the plaintiff, yet, if they should further believe from the evidence that the plaintiff when at a safe distance from the track knew of the approach of the train and with this knowledge went upon the track or near said train, and was injured, he assumed the risk of the injury, and the law is for the defendants and the jury will so find."

This instruction was properly refused because it relieved defendant of all liability, even though it might have discovered plaintiff's peril in time to have avoided the injury by the exercise of ordinary care.

It is also argued that instruction "F" should have been given. That instruction is as follows:

"The jury are instructed that if the agents and servants of the defendant in charge of the train which injured the plaintiff gave timely and reasonable warning by the ringing of the bell or other reasonable warning of the approach or movement of said train at the time and place where the plaintiff was injured, and if at said time the said plaintiff was racing or running alongside of said train or near the defendant's railroad track in a position where he was not in danger of being struck by said train, and the defendant's agents or servants in charge of said train saw the plaintiff running along by said train, the defendant was not required to anticipate that the plaintiff would put himself in a position of peril, but had the right to assume that he was aware of the danger of coming in contact with said train and would keep out of danger, and, if the jury shall believe from the evidence that the plaintiff while running by the side of or racing with same, collided with the said train or got so close to said train as to be struck or run over by it in passing, and was so struck or run over by said train and injured, the law is for the defendant and the jury will so find."

There was no error in refusing this instruction because there was no substantial evidence on which to base it.

Still another contention is that the court should have given instruction "I," or a corrected instruction embodying the same idea. The offered instruction is as follows:

"The court tells the jury that it is as much the duty of the fireman to coal his engine as it is to keep a lookout where a lookout duty is required. And if they believe from the evidence that at the time and place the plaintiff sustained his injury complained of the fireman was engaged in coaling his engine, then and in that event the defendant could not be held to be guilty of negligence for failing to keep a lookout at said time, if he did so fail."

It may be conceded that at one time the court was inclined to adopt this view of the law, *L. & N. R. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227; *L. & N. R. R. Co. v. Gilmore's Admr.*, 131 Ky. 132, 109 S. W. 321, but in response to a petition for rehearing filed in the last mentioned case, 114 S. W. 752, the court said:

"If the conditions are such that the engineer cannot do it, as if his engine is on a curve so that his view is obstructed, or if it is otherwise impossible for him to do it, the fireman must keep the lookout. He will not be excused because he may have occasion at that moment to put coal into the fire box of the engine, or to perform any other duty about it less urgent and imperative than that of seeing to the safety of lives either on the train or of those on the track. As between the duty of firing the engine and looking out for the safety of people to whom he is under duty to look out for, whether passengers, laborers, travelers upon highway crossings, or licensees, he must give preference to that duty which conserves human life and safety."

The same view was taken of the question in the more recent case of *C. & O. Ry. Co. v. Banks' Admr.*, *supra*. We may therefore regard it as the settled rule in this state, that in cities, towns and thickly settled communities, where a lookout duty is required, and the physical conditions are such that a lookout by the engineer alone is not effective, then it is the duty of the fireman to keep a lookout unless engaged in the performance of a duty

no less urgent and necessary for the protection of human life, and the putting in of coal is not such a duty. That being true, it was not error to refuse the offered instruction.

But it is earnestly argued that the verdict is excessive, and our attention has been called to certain cases wherein the court intimated that verdicts for less sums were high. In the very nature of things the amount which will compensate a person for personal injury, especially where it is permanent, cannot be measured by strict and definite rules and must be left largely to the sound judgment of the jury. Hence, it is our rule not to disturb its finding unless the amount is so disproportionate to the injury as to strike us at first blush as being the result of prejudice or passion. *L. & N. R. R. Co. v. Cox's Admr.*, 137 Ky. 388, 125 S. W. 1056. In recent years this court has been inclined to approve larger verdicts because of the increase in the cost of living and the decrease in the purchasing power of a dollar. In the case of *Standard Oil Co. v. Titus*, 187 Ky. 560, 219 S. W. 1077, plaintiff was 35 years of age and his injuries resulted in the amputation of his leg eight inches below the knee. A verdict of \$15,200.00 was held not excessive. Other courts have upheld verdicts for even larger amounts for the loss of a foot. Thus in *Galveston, H. & S. A. Ry. Co. v. Harris*, 172 S. W. 1129, a verdict for \$20,000.00 was held not excessive. In the case of *Irman v. Brooklyn City Ry. Co.*, 38 N. Y. S. 990, a verdict for \$25,000.00 for the loss of a foot, by a boy three and one-half years old, was sustained, and thereafter affirmed. 60 Hun. 580. Here, plaintiff was only seven years of age. He has been maimed for life. He has suffered and will continue to suffer both mentally and physically throughout his entire life. He is entitled to compensation not only for such suffering, but for the permanent reduction of his power to earn money after he attains his majority. Viewing his injury in the light of present conditions, we are not prepared to say that the verdict is excessive.

Judgment affirmed.

Commonwealth Life Insurance Company v. McGuire.

(Decided December 7, 1920.)

Appeal from Daviess Circuit Court.

Insurance—Payment of Premiums—Failure to Deliver Policy.—Where a payment on the first premium on a life insurance policy accompanies the application for insurance, and is to be applied to such premium in case the application is accepted and the policy issued, but to be returned in case the application is rejected, and the application is accepted and policy issued and forwarded by the company to its local agent for delivery to the insured and the collection of the balance of the premium, but the agent negligently fails to deliver the policy although requested so to do by the insured or his agent, the policy is nevertheless in full force, for the agent of the insurance company in such case is the agent of the insured and holds the policy for his use and benefit.

E. B. ANDERSON for appellant.

LA VEGA CLEMENTS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

The agent of the Commonwealth Life Insurance Company took from Lawrence McGuire of Owensboro, on August 11, 1917, a written application for a policy of life insurance for \$500.00 on the life of McGuire and McGuire at that time paid him one dollar, which was to be applied on the first premium installment if the application was accepted and the policy issued, and gave to McGuire a receipt which reads as follows:

“August 11, 1917.

“Received from Lawrence McGuire \$1.00, being a deposit on account of application for insurance in the Commonwealth Life Insurance Co., made on the life of self for \$500.00, which said deposit is to be paid to the company if the application be accepted and returned to the applicant if the application be rejected. No obligation is incurred by said company by reason of this deposit unless and until a policy is issued upon said application, and unless at the date and delivery of said policy the life proposed is alive and in sound health.

“C. W. POOLE.

“Signature of agent receiving deposit.”

This application was sent to the main office of the company in Louisville, and on the 17th the company issued the policy to McGuire, which is the subject of this litigation, and mailed it to its agent in Owensboro for the purpose of delivery to McGuire, and the collection of the balance of the premium. The policy was received by the agent about August 19th or 20th. According to the weight of the evidence as found by the court below, one of the agents working out of the Owensboro office called at the McGuire home on the morning of the 20th and delivered another policy to Mrs. McGuire, and told her that he had forgotten to bring the policy on the life of McGuire but would go back to the office and immediately bring it to her. She insisted that he do this and assured him that she had the money ready to pay the balance of the premium and to return immediately with the policy on McGuire, but he did not return that day. Late in the afternoon of the next day, McGuire was injured in a motorcycle collision, from which injuries he died on the 22nd. At the time of the application for and issual of the policy as well as at the time the policy was received at the office of the agent in Owensboro for delivery and at the time the agent called at the McGuire home and promised to go and immediately bring the policy on McGuire and deliver it to Mrs. McGuire, as per the arrangement made with McGuire, he (McGuire) was in good health. The policy was never actually delivered by the agent to Mrs. McGuire or to the insured, and that is the ground upon which the company has refused to pay the policy and, therefore, that is the only question for determination in this case. Under the facts stated was the policy, in contemplation of law, delivered to the insured; or, was actual delivery waived by the company? If either of these things be true, the trial court correctly held the company liable on the policy, otherwise the judgment was erroneous. The spendidly written and well reasoned opinion of Judge Slack, who presided at the trial, with the array of authorities there cited has been of great service to this court in the determination of the questions involved and preparation of this opinion.

By the terms of the application signed by McGuire and the receipt signed by Poole as agent of the insurance company, it was agreed that the company was not to incur liability on account of the deposit of one dollar

with the agent "unless and until a policy is issued upon said application and unless at the date and delivery of said policy the life proposed is alive and in sound health." And further that the one dollar received with the application for the insurance on the life of McGuire "is to be paid to the company if the application be accepted." The application was duly and regularly accepted and the policy issued on August 17th and placed in the mails, directed to the local agent of the insurance company at Owensboro for the purpose of delivery to McGuire and the collection of the balance of the premium. The one dollar which McGuire paid to the agent who took the application and which sum accompanied the application to the insurance company, immediately, upon the issual of the policy, became the property of the insurance company and McGuire was not entitled to a return thereof. McGuire was in good health and was therefore entitled to receive the policy. The contract, therefore, was a completed one and there remained nothing to be done except the actual delivery of the policy, if that were necessary, and the collection of the balance of the premium. A provision in a policy that it shall not be valid, unless the premium is paid when insured is in good health, may be waived by an agent who has authority to take applications for insurance, and power to collect the premium and remit it to the company. *Connecticut Indemnity Ass'n v. Grogran's Admr.*, 53 S. W. 959. We think, however, under the rule adopted by this court in the case of *Commonwealth Life Insurance Company v. Davis*, 136 Ky. 344, and other cases there cited, the mailing of the policy contract by the company to its agent at Owensboro was a delivery of the contract to McGuire, the insured, for the local agent at Owensboro who received the policy for delivery was the agent of McGuire to receive the same for him, *Mutual Life Ins. Co. v. Thompson*, 94 Ky. 253, and the moment the agent at Owensboro received this contract there was a delivery of the same to the insured in contemplation of law. No actual delivery was necessary. We so held in the *Davis* case, *supra*, saying, "There is a line of authorities holding that, when a policy is issued and sent or given to an agent to be delivered by him to the insured, the agent is the agent of insured, and that the receipt of the policy by the agent has the same effect as the delivery of it to the insured would have. *New York Life Ins. Co. v.*

Babcock, 104 Ga. 67, 30 S. E. 273; 42 L. R. A. 88; 69 Am. St. Rep. 134; 25 Cyc. 270. But an examination of the authorities so holding will disclose that at the time the policy was received by the agent the insured was in good health, and, this being so, the policy would be treated as if delivered to the insured when received by the agent."

In the case of Mutual Life Insurance Company of New York v. Thomson, &c., 94 Ky. 257, where the facts were very similar to those of this case, we said: "It seems to us the contract of insurance must, under such circumstances, be regarded as completed and binding on the parties before death of the assured, and that it was both the right and duty of Cochran to deliver the policy as was done. For not only was it placed in his hands by Buckley for that purpose, but the latter received and appropriated to use of the company amount of the premiums that had been placed to credit of Cochran. The lower court did not, therefore, err in assuming and instructing the jury that the policy had been delivered."

The text in Cyc. on this subject is, "Where nothing remains to be done but to issue a policy in accordance with the terms of the application by way of acceptance of such application, the contract becomes complete when the policy is placed in the mail, postage prepaid, for delivery in due course to the insured. Likewise the placing of the completed policy in the hands of the agent for delivery without condition to the insured completes the contract, although the actual delivery by the agent to the insured is not made before the death of the insured." 25 Cyc. 718.

One of the best statements of the law applicable to the facts of this case is found in 14 R. C. L. 898, where it is said, "Where an application is made for a life policy and a sum of money paid to the agent of the insurer to be applied on the first premium if the insurer decides to issue a policy, the contract is complete on the issuance of the policy, and no delivery is essential."

The same text on page 899 says: "The deposit of an insurance policy in the mails, addressed to the insured, is a delivery to him, and the same is true of the mailing, or otherwise delivering the policy to the agent of the insurer with unconditional instructions to deliver the same to the insured, though it is otherwise where the instructions to the agent are conditional. Where

the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remains in the hands of the insurer's agent."

As said in *New York Life Insurance Company v. Babcock*, 104 Ga. 67, "The controlling question, then, on this subject of delivery is, not who has actual possession, but who has the right of possession." McGuire undoubtedly was entitled to the possession of the policy which had been issued upon his life and in which his wife was named as beneficiary and on which a part of the premium had been paid and which he had demanded, and payment of the balance of the premium offered. The agent had no right to retain possession against him; in fact the agent was holding the contract for the use and benefit of McGuire.

Joyce on Insurance, secs. 97b, 100, 102 and 103.

Whether the possession followed the right of possession and the policy was, in legal contemplation, in possession of the insured at the time of the accident to and death of the insured, McGuire, or the company had by its conduct waived actual delivery of the policy, the plaintiff Mrs. McGuire was entitled to recover on it and the trial court did not err in so holding.

Judgment affirmed.

Utterback v. Commonwealth.

(Decided January 7, 1921.)

Appeal from Mason Circuit Court.

1. **Appeal and Error—Evidence.**—A party, upon appeal, cannot complain of evidence upon the trial to which he neither objected nor excepted, at the time.
2. **Criminal Law—Submission to Jury.**—In a trial of one accused of a crime or misdemeanor, where there is any evidence of guilt, although circumstantial, it is the duty of the court to submit the issue to the jury.
3. **Criminal Law—Setting Verdict Aside.**—A verdict of a properly instructed jury in a criminal trial will not be set aside, upon the

ground, that it is against the evidence, unless it is palpably against the weight of the evidence.

A. D. COLE for appellant.

CHAS. I. DAWSON, Attorney General, C. W. LOGAN, Assistant Attorney General, and B. S. GRANNIS, Commonwealth's Attorney, for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.

The appellant, Jesse Utterback, was jointly indicted with George Hambric and Mat Washington for the crime of grand larceny, committed, as alleged by taking, stealing and carrying away, from the possession of Chas. Gamby, twenty-five dollars in currency, which was the personal property of Gamby, and with the intent to convert it to their own use and benefit, and to permanently deprive the owner of the use and benefit of it. The indictment while it alleged that one or the other of the parties indicted actually did the stealing, and which one of them so did, was to the grand jurors unknown, it charged that one or the other of them did the actual stealing, and the other two were present at the time and place, and aided and abetted the one who actually took the money from Gamby. The appellant, Utterback, having requested a separate trial, the Commonwealth's attorney elected to first proceed against him. The trial resulted in a verdict of the jury finding him guilty of the crime charged in the indictment and fixing his punishment at confinement in the penitentiary for two years, and a judgment was rendered accordingly. The appellant's motion for a new trial having been overruled, he has appealed to this court and urges as grounds for a reversal of the judgment that the court erred to his prejudice, first, in admitting incompetent evidence against him, and second, in denying a motion for a peremptory instruction in his behalf, and third, in denying him a new trial upon the ground that the evidence was insufficient to support the verdict.

The grounds upon which the reversal is sought, make it necessary to consider the evidence heard upon the trial which, in substance, proved the following facts and circumstances. Appellant whose home was at Lawrenceburg, Ky., for some reason not explained, was

in attendance at the fair held near Germantown, in Mason county. There he became an associate of Hambric, whose home was in Cincinnati, Ohio, and of Washington, whose home was in West Virginia. Appellant and his two associates were seen together upon the fair grounds during at least two days of the fair. Charles Gamby, the victim of the larceny, was a colored man, who lived in the neighborhood of Germantown and who was in attendance at the fair, and who had in his rear pants pocket, a pocketbook which contained a ten dollar bill and three five dollar bills. The flap of the pocket was buttoned, but Gamby seems to have been fearful of the loss of his money at the hands of pickpockets, and for that reason frequently felt of his pocket to ascertain if he yet had his money. In the afternoon of Thursday, while a show of farmers' teams was being exhibited, Gamby was standing against the railing around the amphitheater of the fair and viewing the show then being put on. The appellant, Utterback, was leaning with his arm upon Gamby's shoulder and making inquiries of him in regard to the show and the actions of the exhibitors. About two feet in the rear of Gamby sat Hambric and nearby was Washington. In a short time, thereafter, Gamby discovered that his pocketbook and money were gone, and he immediately set out to search for the appellant and his associates, whom he was informed had gone out of the fair grounds in the direction of Germantown, which was about one mile away. He went to Germantown on the hunt for them, but not finding them, returned to the fair grounds where he met with Hambric, and immediately charged him with having purloined his money. Hambric denied any knowledge of it, but he and appellant and Washington immediately and hurriedly went out of the fair grounds and secured seats in an automobile for the purpose and which took them to Maysville. A few minutes after Gamby discovered his loss, Hambric and the appellant were seen, about one hundred yards from the fair grounds, engaged in handling paper money, and within a few feet of where they were seen, in a short time thereafter, Gamby's empty pocketbook was found, lying beside the road. The pocketbook was identified as the property of Gamby, by a ticket in it upon which Gamby's name was written, and besides Gamby testified that it was the pocketbook which he had in his pocket, and which was

taken along with his money. He made complaint to the marshal of the fair, who immediately communicated with the chief of police at Maysville, and who, upon the arrival at that place of the appellant and his two associates, put them under arrest. They denied any knowledge of each other, and, also, denied having the custody of any money. A cursory search by the marshal developed the fact that Washington had three dollars, while Hambric had forty-one cents, and the appellant thirty cents. After the arrival of Gamby at Maysville, which occurred very soon thereafter, a more thorough search was made of the three parties, when the appellant was found to have in addition to the small sum which was found upon his person, upon the first search, a five dollar bill and five one dollar bills, which he endeavored to conceal from the chief of police, who was making the search, by secreting it in his handkerchief, which he laid aside when he was required to disrobe and submit to a thorough search. Hambric was found to have a five dollar bill, in addition to the sum which had already been discovered upon him. This made the sum of \$18.71 between them, and they had paid to the driver of the automobile, for conveying them from the fair grounds to Maysville, the sum of two dollars and seventy-five cents.

While the chief of police of Maysville was testifying as a witness, he deposed that he communicated with the marshal of the fair grounds over the telephone, saying to him that he had arrested the three parties and was holding them as prisoners, and that the marshal replied, in substance, that the person whose pocket they had picked was then on his way to Maysville, and would arrive there very soon. This testimony of the chief of police is complained of as being prejudicial to the substantial rights of the appellant. An examination of the transcript develops the fact that no objection was made to this testimony by the appellant, nor was any exception taken to its admission. It is settled by a long line of decisions of this court, that an appellant can not be heard to complain of the admission of testimony to which he did not object in any way upon the trial. *Belcher v. Commonwealth*, 181 Ky. 516; *Dalton v. Dalton*, 146 Ky. 18; *McGee v. Vanover*, 148 Ky. 737; *Fish v. Welch's Admr.*, 157 Ky. 17; *Harris v. Commonwealth*, 163 Ky. 781.

The same rule prevails in regard to a failure by the party upon whom the burden of proof is cast, in a criminal action, as prevails in a civil one—that is, if the party having the burden of proof does not produce any evidence to sustain his contentions, a verdict should be directed. The appellant was guilty of the crime of which he was accused, if he feloniously took, stole and carried away the money of Gamby, with the intent to appropriate it and to deprive the owner of it, or if Hambric or Washington so took the money and appellant was present and aided or abetted the one so feloniously stealing the money from Gamby, and the court so advised the jury. The appellant was resting his arm upon the shoulder of Gamby, to whom he was a stranger, and conversing with him, while Hambric was sitting about two feet in the rear of Gamby, a few minutes before the loss of the money was discovered. In a very short time, appellant and Hambric were outside of the fair grounds and on the road to Germantown, and were handling paper money as though dividing it, and right at the point where they were seen with the money in their hands, the pocket book, which had contained the money, was found in a very short time; when accused, Hambric and Washington were charged with the theft, they immediately and hurriedly left the grounds for Maysville, where they denied any knowledge of each other or having any money, and the money upon them was not discovered until a second and thorough search was made, when a sum, within three or four dollars of the amount stolen from Gamby, was found upon their persons. One of the bills stolen from Gamby was a ten dollar bill, and no such bill was found in the possession of either the appellant or his confederates, but this is not an insurmountable obstacle to the belief in the guilt of appellant, since he had opportunity to have converted the ten dollar bill into bills of a smaller denomination. Two five dollar bills were found, one upon the accused, and the other in the custody of Hambric. The evidence of appellant's connection with the larceny was circumstantial, but the facts were such as from which the jury was authorized to infer that he was guilty. If there is any evidence, although circumstantial which connects a defendant with a crime, with the commission of which he is accused, it is the duty of the court to submit the issue of his guilt to the jury. *Miller v. Commonwealth*, 182

Ky. 438; Daniels v. Commonwealth, 181 Ky. 392; Hayes v. Commonwealth, 171 Ky. 291; Commonwealth v. Gritten, 180 Ky. 446; Little v. Commonwealth; 177 Ky. 24. Hence, there was no error in denying the motion of appellant for a directed verdict in his favor, and in submitting the cause to the jury.

Touching the appellant's contention that the evidence was insufficient to support the verdict, and for that reason he was entitled to a new trial, the uniform principle applying in this state to criminal procedure is that a verdict of conviction will not be set aside, unless it is palpably against the weight of the evidence, and this rule prevails as well when the evidence is circumstantial, as when otherwise. Minnaird v. Commonwealth, 158 Ky. 216; Chaney v. Commonwealth, 149 Ky. 467; Wilson v. Commonwealth, 140 Ky. 1; Hall v. Commonwealth, 152 Ky. 812. The verdict in the instant case, although the evidence was circumstantial, does not appear to be either flagrantly or palpably against the weight of the evidence.

The judgment is therefore affirmed.

Weitlauf and Wife v. Paducah & Illinois Railroad Company.

(Decided September 14, 1920.)

Appeal from McCracken Circuit Court.

1. Railroads—Change of Location—Obstruction of Streets.—One who acquires real property in a city at a time when a preliminary survey of a railroad company is located a block or more away, may recover damages of the railroad company if it changes its location so as to obstruct the street in front of property acquired and cut off the means of egress and ingress, or the railroad company in the operation of its trains casts cinders and smoke upon the premises and otherwise interferes with the enjoyment of the premises.
2. Railroads—Obstruction of Streets.—Where the facts are controverted it is for the jury to determine whether the plaintiff has made out his cause by showing that the streets have been obstructed, or that the railroad in its operation has cast cinders and smoke upon the house.

WHEELER & HUGHES for appellant.

D. G. PARK for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Some years ago the Paducah & Illinois Railroad Company projected its line of road through Paducah and its suburb, Colonial Heights, in McCracken county, Kentucky. At the time of the preliminary survey of the railroad Colonial Heights was only slightly improved but it was laid off into streets and lots. The stakes for the railroad were driven along or near Thirty-fifth street. The appellants, Weitlauf and wife, purchased from the land company fifteen building lots in what was then regarded as a new residential district in Colonial Heights. At the time of the purchase of the lots the stakes for the railroad were along Thirty-fifth street. Weitlauf erected a home upon three or four of the lots on Central avenue, and moved into it with his family. These lots were facing on Thirty-third street and Central avenue, some distance from the proposed line of railroad as indicated by the stakes. Some months after the completion of the Weitlauf residence on Central avenue, the railroad company changed its location from Thirty-fifth to Thirty-third street and constructed its line of road along Thirty-third street adjacent to the home and premises of appellants. In doing this work the railroad raised the grade of the street from two to six feet in front of the property of the Weitlaufs. In operating its road along the street the Weitlaufs charge that the railroad company cast cinders and smoke on to their premises and into their house and the constant moving of trains up and down the track adjacent to their property jarred and otherwise annoyed them and their family. Conceiving, that they had been damaged by the construction and operation of the railroad which obstructed certain streets being used for purposes of ingress and egress by the Weitlaufs, and by the casting of cinders and smoke upon their premises and by the jar and noise of the trains the Weitlaufs instituted this action against the Paducah & Illinois Railroad Company to recover for the diminution or depreciation of the market value of the real estate in its entirety which resulted proximately from the construction and operation of the railroad.

Issue was joined and a trial had before a jury which returned a verdict for the defendant railroad company. Judgment being entered in accordance with the verdict the Weitlaufs appeal, urging several grounds for a re-

versal of the judgment but relying chiefly upon the failure of the trial court to properly instruct the jury.

It is practically conceded that the preliminary line for the railroad through Colonial Heights was located at a different place to that where it was finally constructed along in front of appellants' premises and that appellants purchased their property while the stakes for the railroad were in or near Thirty-fifth street; the railroad grade is much above the street grade on Thirty-third street and thus in some measure obstructs that street as well as others it crosses which lead to and from the Weitlaufs' premises, but upon this latter question there is a contrariety of evidence. Several witnesses testified upon the question, and the jury was permitted to visit and examine the premises, including the railroad grade and alleged obstruction. With these facts all before the jury it was within its province to determine the rights of appellant under proper instructions from the court. The court instructed the jury in substance that certain of the lots of appellants which were mentioned in the evidence abutted upon Thirty-third street, and that certain other numbered lots of appellants abutted on Central avenue. The court then told the jury that if it believed from the evidence that the railroad when it constructed its road through said subdivision and over and across either of said streets, if it did so construct its said road, so obstructed or destroyed either of said streets as to unreasonably interfere with the Weitlaufs' right to the use of either of said streets in going to or from their said lots or any of them; or if the jury believe from the evidence that by reason of the defendant operating its engines and trains over said road and track adjacent to plaintiffs' property or on or over either, or across either of said streets, smoke, dust or cinders were thrown upon plaintiffs' said house and property by the force of steam escaping from its locomotives operated on its said track; or that by the operation of trains thereon, plaintiffs' house has been jarred or shaken, and by reason of either or all of these things, plaintiffs' property has been diminished in value, the law is for the plaintiffs. The second instruction was a measure of damages. Appellants complain that the first instruction given by the court was restrictive and did not allow the jury to find for the plaintiffs all the damages to which they conceive

themselves entitled and to which they were in fact entitled if the jury accepted their evidence, in this, that the court neglected to say in the second part of the first instruction that appellants were entitled to recover for smoke and cinders thrown upon other parts of the property than plaintiffs' house. A like objection is made to the third part of the first instruction wherein the court confined the jury to the jarring of the plaintiffs' house, whereas, appellants insist that they were entitled to damages for the jarring of their other property as well.

Appellants through their counsel offered instructions "A and B," which are considered well drafted and to fairly present the law of the case, but these two instructions were rejected by the court because they covered in substance the same phases of the case presented by the instructions given by the court. Had the court adopted the offered instructions in lieu of the ones given, the jury would have had a more concise, complete and clear statement of the law of the case, but we do not think that appellants' rights were prejudiced thereby, for the jury rejected their claim *in toto*. If the jury had found for the plaintiffs only such damages as resulted to their house and had ignored their claim for damages to the balance of their premises, there would be some ground for the objection now made by appellants; but under the present status of the case we do not agree with counsel for appellants that their rights have been prejudiced by the instructions given by the court.

This court in the cases of *Cosby, &c. v. Owensboro & Russellville R. R. Co.*, 10 Bush 288; *Elizabethtown, Lexington & Big Sandy Railroad Company v. Combs*, 10 Bush 382; *Newport & Cincinnati Bridge Company v. Fbote, &c.*, 9 Bush 264, recognized the right of an abutting landowner to damages for injury occasioned to his property by the construction and operation of the railroad along the public street or road adjacent thereto, which interfered with his ingress and egress or cast cinders, smoke and dust on to and into his house and premises or jarred or otherwise interfered with the enjoyment of his property. This was before the adoption of our present Constitution, section 242 of which somewhat enlarges the rights of property holders and allows compensation in some cases where before it was not granted. In the case of *Jeffersonville, Madisonville*

& Indianapolis R. R. Co., &c. v. Esterle, 13 Bush 676, this court laid down the measure of damages in such cases to be the diminution in the value of the houses and lot occasioned by the location of the railroad tracks and the uses to which they were authorized to put them by the grants from the city authorities. To find the diminution, the value of the property just preceding the time at which it became generally known that the street had been selected as the line of road should be ascertained and the value of the property immediately after the construction of the railroad and the commencement of the operation of the trains. In the Esterle case we said, "The jury should ascertain what the value of the property was just before it became generally known that the appellants' roads were to be located in front of it, and then determine what proportion of that value was taken from the house and lot by the obstruction of the street and the annoyances incident to the movement of the engines and trains of cars along and over appellants' road." This measure of damages seems simple enough and quite easily applied and we believe was fairly presented by the instructions given by the trial court in this case.

There appearing no error to the prejudice of the substantial rights of the appellants the judgment is affirmed.

Judgment affirmed.

State Board of Charities and Corrections v. Hays, et al.

Same v. Combs, et al.

(Decided November 5, 1920.)

Appeals from Franklin Circuit Court.

1. **Action—Misjoinder—Mandamus.**—There is no misjoinder where only cause of action for mandamus is stated, although the prayer in addition to a judgment for mandamus asks for a judgment for money.
2. **Statutes—Subjects and Title.**—An act of the legislature which relates in both its title and body to more than one subject is wholly void under section 51 of the Constitution.
3. **Statutes—Subjects and Title—Working Prisoners.**—Chapter 36 of the 1916 Acts of the legislature relates to working all prisoners

in the state penitentiary within and without prison walls and to paying all of them a small per diem for their labor and every feature of the body of the act is specifically covered by the title. Held that labor and payments therefor are not unrelated subjects and the act is not violative of section 51 of the Constitution.

4. Pardon—Authority to Pardon, Reprieves, Remit Fines and Forfeitures.—The provision for the payment of prisoners a small per diem for their labors is not an encroachment upon the powers conferred upon the Governor by section 77 of the Constitution to remit fines and forfeitures, commute sentences, grant reprieves and pardons.
5. States—Certification of Amount Due Prisoners.—A provision in the act that "At the end of each month the board of prison commissioners shall certify to the auditor of public accounts the amount due each prisoner for that month, and he shall draw warrant on the state treasurer for the amount so certified" is an appropriation within the meaning of section 230 of the Constitution.
6. Statutes—Enrolled Bills—Impeachment.—An enrolled bill signed by the proper officers and approved by the Governor cannot be impeached by the journals of the house and senate.
7. States—Payment of Per Diem to Convicts—Board of Charities and Corrections.—The provision in an act of the legislature for the payment to convicts of a small per diem for their labors, subject to forfeiture for violations of rules of misbehavior, is a reasonable exercise of the police power of the state, which cannot be delegated to a board of prison commissioners.
8. States—Payment of Per Diem to Convicts.—The act provides that the board of prison commissioners shall provide rules and regulations for the payment of not less than five nor more than fifteen cents per day to each convict for his labor. Held that the payments are gratuities and not wages and may be granted or withheld or withdrawn by the legislature at any time before payment; and that the power conferred upon the board to determine by rules and regulations the amounts thereof within the prescribed limits is administrative and not legislative.
9. States—Payment of Per Diem to Convicts—Constitutional Law.—The proposed payments as rewards for obedience and service and looking to the reformation of the convicts are not within the inhibition of article 3 of the bill of rights that "No grant of exclusive, separate, public emoluments or privileges shall be made to any man or set of men except in consideration of public services."
10. Statutes—Repeal—Repugnancy.—An act will not be held to have been repealed by a later act by implication in the absence of clear repugnancy and where the same legislature by a still later act expressly repealed and re-enacted the original act.
11. Statutes—Repeal—Repugnancy.—Ordinarily the repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the

original statute but as a continuation thereof; but where the repeal and re-enactment of an act which authorized payment of gratuities could have had no other purpose except to withdraw gratuities which had been authorized but not paid under the original act and grant them anew such effect should be given the legislative action rather than so construe it that it would have been a vain and foolish thing.

12. Statutes—Convicts—Board of Charities and Corrections.—The only right conferred upon the convicts by either act was the right to a mandamus against the board of prison commissioners requiring them to carry out the mandatory provisions thereof.
13. Statutes—Repeal—Claim Under Existing Law.—Section 456 of the statutes which merely protects from repeal an accrued right or claim arising under an existing law is not applicable and cannot be invoked in behalf of a claim to a mere gratuity that is withdrawn before payment.

CHAS. I. DAWSON, Attorney General, and W. T. FOWLER, Assistant Attorney General, for appellant.

HAZELRIGG & HAZELRIGG, GUY H. BRIGGS and HOBSON & HOBSON for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

These two actions by different groups of prisoners against the board now in control of the state penitentiaries seek by mandamus to enforce the mandatory provisions of section 7, chapter 36, Acts of 1916, being subsection 7 of section 3828a, Kentucky Statutes.

For defense upon the merits the board in both actions contends that the section of the act involved is unconstitutional for many reasons, and was repealed by a later act of the legislature.

Before considering these questions one of practice will be disposed of briefly.

The petitions state only a cause of action for mandamus but plaintiffs pray not only that a writ of mandamus be awarded them and other prisoners for whom they sue but also "for a judgment on behalf of them for all arrearages, for their costs, and all proper relief." Defendants insist that there is a misjoinder of actions, one for a mandamus and the other for money judgments, and that the court erred in overruling their motion to elect. A complete answer to this complaint is found in the fact that no cause of action is stated and no judgment could have been entered upon a default for any sum of money in behalf of any plaintiff. There is

therefore no misjoinder and the mere fact that plaintiffs prayed for more than they were entitled to recover upon the facts alleged in their petition is immaterial.

The act in question is said to be unconstitutional because:

(a) It relates to more than one subject.

(b) It is an encroachment upon the pardoning power of the governor.

(c) The money necessary to make it effective is not appropriated, but if so the act did not receive the number of votes necessary under the Constitution for its passage.

(d) It delegates to the prison board legislative powers.

(e) It confers special and exclusive emoluments upon individuals not in recognition of public service, and diverts taxes collected by the state to other than public purposes.

(a) Section 51 of the Constitution provides in part:

“No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title.”

The act in question relates in its first six sections to working convicts outside of prison walls and upon the public roads, while section 7 provides for the payment of all convicts, whether employed outside of or within prison walls, of not less than five nor more than fifteen cents per day for their labor. The title specifically covers every provision of the act, so that the act if violative of section 51 of the Constitution is wholly void. *Hind v. Rice*, 10 Bush 528. This is necessarily true because one part of the body of the act cannot be saved rather than the other where both are covered alike by the title, as may be done where a portion of the body of the act alone is violative of this section of the Constitution. In the former case to hold one portion of the act rather than the other valid would require of the judiciary the selection of the subject matter of the act, upon a mere guess and without legislative guide to determine which, if either, of the two subjects would have been considered alone by the legislature. Upon the other hand where the body of the act contains a departure from a valid title, such portion of the act may be declared void and all that is pertinent to the title selected by the legislature may be enforced by the judiciary as a legitimate

exercise of legislative authority under its own selection of the subject matter of the enactment. In other words the selection of the subject matter of an act is a legislative and not a judicial prerogative.

We must therefore in this case either declare the act wholly void or wholly valid so far as section 51 of the Constitution is concerned, and hence cannot restrict our view alone to section 7 thereof, which provides for payment of all convicts in small part for their labor.

Thus considering the act, we find that by section 8 the board is given full power to provide means and methods of employing all convicts retained within prison walls; and by section 9 is empowered to lease a farm or farms and work the prisoners thereon. Hence the act deals comprehensively in detail with where and how all prisoners shall be worked both inside and outside of prison walls, and not simply of working them upon the public roads. It treats of working some prisoners on the roads, others on farms and others within prison walls, and provides for the payment of all whether they labor on the roads of the state, or upon farms or within prison walls, a small per diem for their labor.

Certainly this is one comprehensive act dealing with the one subject matter of prison labor wherever performed; and unless labor and remuneration therefor are unrelated matters, the act treats of but one subject. Surely labor and pay therefor are not unrelated matters that must be dealt with in separate acts. Whether the legislature had the power to pay convicts for their labor is another matter to be hereinafter determined, but if it had that power it clearly could make the provision for paying all convicts therefor in an act which provided the method and means of employing all convicts.

We are therefore of the opinion the act is not violative of section 51 of the Constitution.

(b) Nor is it an encroachment upon the powers of the governor conferred by section 77 of the Constitution to remit fines and forfeitures, commute sentences, grant reprieves and pardons, etc. That this is true is apparent from the fact that the governor has no power whatever to grant pay to convicts for their labor or withhold same or prescribe methods or means for their labor; and may still, notwithstanding this act, exercise as fully as before his every power to remit forfeitures, commute sentences, grant reprieves and pardons for

any and all of the convicts. This act only affects prisoners to the extent they have not received executive clemency and subject to any such clemency that may be conferred upon them at any time.

(c) It is next contended the act violates section 230 of the Constitution in so far as it provides pay for convicts because there is no appropriation of money for the purpose.

Section 230 provides:

“No money shall be drawn from the state treasury except in pursuance of appropriations made by law.”

Hence if it is true as contended that there is no appropriation of the funds necessary to pay convicts for their labor, so much of the act as provides therefor is void. However in section 7 of the act it is provided:

“At the end of each month the board of prison commissioners shall certify to the auditor of public accounts the amount due each prisoner for that month, and he shall draw warrant on the state treasurer for the amount so certified.”

A similar provision for the payment of pensions to disabled Confederate veterans was held in *Bosworth v. Harp*, 154 Ky. 559, to be an appropriation within the meaning of this provision of the Constitution; and so too must we hold here.

It is also contended under this head that if the act does carry the necessary appropriation it is yet invalid because it did not receive the necessary majority of the entire membership of both branches of the legislature as required by section 46 of the Constitution. For proof of this assertion we are asked to look to the journals of the house and senate. But this we cannot do. The enrolled bill was signed by the proper officers and approved by the governor, and cannot be impeached by the journals. This is the settled law of this state and supported by the weight of outside authority though not unanimously. *Lafferty v. Huffman*, 99 Ky. 80; *Commonwealth v. Shelton*, 99 Ky. 122; *Commonwealth v. Hardin County Court*, 99 Ky. 190; *Wilson v. Hines*, 99 Ky. 228; *O. & N. Ry. Co. v. Barclay*, 102 Ky. 20; *Taylor v. Beckham*, 108 Ky. 300; *Waller v. Murray*, 21 R. 783; *Stone v. Dispatch Co.*, 21 R. 1475; *Zimmerman v. Brooks*, 118 Ky. 101; *Vogt v. Beauchamp*, 153 Ky. 67. See also 25 R. C. L. 897; 32 L. R. A. (N. S.) 20 and note.

(d) It is next insisted that the act is invalid because it delegates to the prison board authority to fix the amount within certain limits that shall be paid to convicts for their labor. Before attempting to pass upon this contention we deem it expedient if not necessary to consider briefly the status of convicts and the character of the proposed payments, whether they are gratuities as contended by appellant or wages as contended by appellees. Originally at the common law felons were without civil rights or capacities of any kind. They could not own or inherit property during life nor be the means of its transmission after death. The extreme harshness of this conception was somewhat relaxed before the common law became a part of our law, and has been materially altered since until now the property rights of convicts in all respects save as to their labor are as secure and protected or enforced in the self same way as those of any other person. They may own, inherit and transmit property; they may sue and be sued. This change has not been effected by a single statute or decision, but is the result of constitutional, legislative and judicial recognition of successive steps in a slow but constant improvement in the public consciousness and attitude toward those of the community who have become wards of the state, as often as not, because they are unfortunate rather than vicious.

It is a radical change in the public policy of course to pay convicts, or their dependants, any part of the fruits of their labor, but not more so than other changes that have been effected in the public policy in reference to the property rights of convicts.

But does this act effect or even attempt a restoration to convicts of property rights in their labor, even if we assume the legislature under present constitutional restrictions had the power to do so? We are sure it does not.

It has been considered always and everywhere that the labor of convicts is the property of the state, and our whole constitutional and legislative structure so regards it. It is performed involuntarily and under duress as a punishment for crime and not voluntarily or pursuant to contract; and this conception is not altered in the least by the present act. So long as penitentiaries are maintained and persons are confined therein as a punishment for crime, the state must have and exercise

the right of imposing involuntary labor upon the inmates. The labor of the convicts cannot be the property of the state and of the convict at the same time. The state cannot impose its restraint upon the convict's liberty of action and also waive its right to his labor or recognize his right to contract for his services or to labor or not as he may elect. Any concession therefore to the convict with respect to his involuntary labor or the fruits thereof is necessarily a dispensation of legislative grace, and not a recognition of a property right in the convict to his labor. It necessarily follows then that the proposed payments are mere gratuities that may be granted or withheld or withdrawn at any time by the legislature, if indeed it has the power to grant them, and if it has this power it is certainly a legislative function that cannot be delegated to the prison board or other purely administrative agency.

Assuming therefore for the moment the legislature had the power to grant the proposed gratuities, does the act delegate that power to the board? It imperatively requires that the board shall provide rules and regulations by which all prisoners who labor for the state, or their dependants, shall be paid not less than five nor more than fifteen cents a day for their labor. Hence the legislature has determined for itself that all prisoners who labor for the state shall receive therefor at least five cents but not more than fifteen cents per day, subject however to forfeiture for violations of rules or other misconduct; and the question of pay or no pay has not been delegated to the board. It has, however, left to the board the decision between these narrow limits of the per diem that shall be paid.

The board may fix the per diem at five cents or fifteen cents or any intermediate amount as may appear to them wise, since the value of the labor is manifestly not the criterion for the determination of the per diem. The legislature has therefore delegated to the board only a limited power to determine the amount and conditions of forfeiture of the proposed payments. If this is a legislative function it is void but if administrative only it is valid. But what is the power that the legislature is attempting to exercise in part and to delegate in part to the prison board? As we shall hope to demonstrate later in this opinion it is the police power of the state and the proposed gratuities are rewards for obedi-

ence and service and look to the reformation of the convict.

Being in the nature of rewards and not compensation the exact amount that should be paid to the different convicts necessarily depends upon the quality of their obedience and service, or the very purpose of the enactment fails. The question of rewards or no rewards is therefore legislative, but the extent thereof within legislatively prescribed limits is purely administrative since it depends upon an application of the law to the facts of each instance of its application. For instance, the board administering the law, in the rules and regulations to be provided, may begin with the minimum reward for the first year of incarceration and increase same gradually to the maximum for continued submission to discipline and improvement in the qualities that make for good citizenship, or by some other like arrangement suggested by its experience in handling the convicts work out a system that will not only be for the good of the state but for the good of the convicts as well.

To accomplish the purpose in view some such latitude was necessarily left to the board in administering the law since exact rewards could not be dictated by the legislature in advance and without knowledge of the facts necessary for its application. We are therefore convinced that the legislature has exercised fully and completely the legislative power and has delegated to the board only such power as was essential to the administration of the law, and which could not have been more narrowly restricted without defeating the very purpose of the enactment.

(e) The next contention is that the act is violative of that part of section 3 of the Bill of Rights which declares that:

“No grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men except in consideration of public services.”

We have just said that the payment of a convict for his labor in whole or in part is a dispensation of legislative grace, a mere gratuity (and not a wage) that may be granted or withheld or withdrawn by the legislature at any time. It is from this very premise that counsel for the board argue that such payments are also in violation of this constitutional provision. But granting the premise we are convinced the conclusion is unsound.

Webster's New International Dictionary defines emolument as, "Profit from office, employment or labor; compensation; perquisites, fees or salary."

The proposed payments therefore may be in a sense emoluments and, being paid out of public funds, public emoluments. But if so, instead of being exclusive or separate they are inclusive rather, since the act in question only extends to convicts in a measure and as a gratuity what everybody else under the government enjoys in full measure and as a right, except as sometimes limited of public necessity; that is, reward for labor performed for the public.

That the labor is performed for the public when the public to the exclusion of the laborer, gets all the fruits thereof surely will not be denied; but is labor performed by a convict for the public in expiation of his crime a public service? In a way it is, but probably not in the sense "public service" is used in the Bill of Rights. Neither do we consider the proposed payments "exclusive, separate public emoluments" as that term is used in the Bill of Rights.

The way in which the labor performed by a convict is a public service, and a distinct one we think, and for which only the payments are to be made, is when it is performed in such manner as to improve not only the discipline among prisoners but also the capacity of the prisoners for restored citizenship. And from such a service the state may reasonably anticipate, in addition, a very material advantage to itself in the shape of an increase in the prisoners' efficiency as laborers and a correspondingly larger yield from their labors.

We are convinced however that this constitutional inhibition was never intended to reach and does not in fact touch the question before us. Clearly these payments are made to stimulate the prisoner to render a better service and a better obedience during his necessary confinement and look to his reformation and are therefore an exercise of the police power inherent in sovereignty and a necessary attribute of every government.

This statute is of exactly the same general character as are statutes which hold out to convicts the chance of parole and credits for good conduct. They all adopt the idea of rewards rather than punishments as a means not only of enforcing discipline but also and

of greater importance of fitting the prisoners for restored citizenship. The penitentiary is no longer regarded as merely a place for the infliction of a deserved punishment upon criminals but is more justly and humanely appraised as an institution for the redemption of the morally and intellectually defective wards of the state. Actuated by this more enlightened conception of its duties to this class of its wards, the state has furnished at much expense chaplains for their spiritual and moral instruction; doctors and nurses for the conservation and improvement of their physical being, and schools of every character to eradicate not only illiteracy and inefficiency but other causes of crime in order that the one time criminal and charge upon the state upon his liberation from confinement may be properly equipped spiritually, physically, mentally and morally for the duties of good citizenship and to avoid a return to crime.

The state is learning by experience that this is the better plan in the management of its wards just as many a parent has learned that kindness and rewards rather than harshness and punishments procure a more willing obedience to reasonable and necessary regulations and at the same time improve both the parent and the child. Certainly the results hoped for justify the effort and any incidental expense that the state may incur. And surely such an effort is a reasonable exercise of the police power of the state.

We are therefore clearly of the opinion that the proposed payments are not for any of the reasons assigned unconstitutional.

2. We come now to a consideration of whether the act has been repealed. It is insisted that this was twice done by the legislature at its 1920 session, once by implication and later by express provision.

The provisions of section 4 of chapter 7 of the 1920 Acts approved March 9, 1920, are relied upon as a repeal by implication of the provision of the 1916 act for payments to prisoners for their work. There is, however, in our judgment no repugnancy in the two provisions. We need not assign our reasons for so believing, since the legislature has indicated very clearly that it did not intend by any of the provisions of the act of March 9, 1920, to repeal the provisions for payment of convicts in the act of 1916. Nor did the legislature that passed this act attribute any such force to it because

later in the same session it expressly repealed and re-enacted the act of 1916, by chapter 159 of the 1920 session acts. We should not therefore attribute by implication to the earlier act of the 1920 session a force which the same legislature did not ascribe to it.

This leaves only for consideration the effect if any upon the act of 1916 of its repeal and re-enactment at the 1920 session of the legislature. Ordinarily it is the rule, as stated in 36 Cyc. 1084, that the "repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute but as a continuation thereof." Under this rule it is insisted by appellees that there was not a withdrawal by the new act of the gratuity granted by the old act, but rather a continuation thereof; that there was no break whatever in the force and effect of the old act.

For the appellants it is argued that the repeal of the old act by the new one was a withdrawal of the gratuity and a new grant thereof from the effective date of the new act.

Conceding the soundness ordinarily of the rule above quoted from Cyc., we do not consider it applicable to the peculiar facts of this case. When the old act was enacted the penitentiaries were governed by three commissioners appointed by the governor, by and with the advice of the senate, and designated as the board of penitentiary commissioners. In an effort to improve the management of the penitentiaries and other eleemosynary institutions by placing all under one management the legislature at its 1918 session created for the purpose a board to be composed of five members and designated the state board of control. The board of penitentiary commissioners was abolished and all of its duties imposed upon the newly created board. In a further effort to improve the management of these institutions by taking same out of politics the legislature in the early part of its 1920 session abolished the board of control and created in lieu thereof a board of eight members, two of whom were to be women and not more than four of whom to be of the same political party and called the state board of charities and corrections, upon which was conferred all of the duties and powers of the board of control.

It was the board of penitentiary commissioners that under the act of 1916 was required to provide the rules and regulations for the payment to prisoners of a small per diem for their labor. Neither this board nor its successors had performed this service and this feature of the act had never become effective.

After creating the state board of charities and corrections and placing the penitentiaries in its charge, the legislature later in its 1920 session repealed and re-enacted, as we have stated before, the act of 1916. The only change made was the substitution of the name of the state board of charities and corrections for that of the older abolished board wherever the latter occurred in the old act. The purpose of the legislature in thus repealing and re-enacting the old act could not have been merely to impose upon the newly created board in charge of the penitentiaries the duty of providing rules and regulations for the proposed payments to prisoners, since in each instance all of the duties, privileges and powers of the abolished board were specifically conferred upon the newly created board.

The legislature knew this when it repealed and re-enacted the 1916 act, and it also knew of course that this authority to pay prisoners had never been exercised by any of the several boards that had possessed it. Unless therefore the legislature meant, by the act which repealed and re-enacted the 1916 act, that the duty successively imposed upon the old and new boards of providing rules and regulations for the payment of prisoners for their labor should be withdrawn and begin anew with the effective date of that act, it would be a wholly foolish and vain thing. No other possible force or meaning can be ascribed to it. We are therefore constrained to hold that this act was a withdrawal of the gratuities which had been authorized but which had never been claimed or paid under the act of 1916, and a new and separate grant of authority to the new board to pay similar gratuities. Such must have been the intention of the legislature, and this it clearly had the right to do at any time before the proposed gratuities were actually paid and certainly before they were even claimed or the necessary rules and regulations had been provided under which same were to be paid. Being gratuities merely, appellees never had a vested interest in or a contractual right to same, or any enforceable claim

thereto arising under the 1916 act. The only enforceable claim or right that was conferred upon them by the act of 1916 or the act of 1920 was and is the right to require the proper board to provide rules and regulations for the payment of gratuities to them, just as they are doing by these actions. Section 456 of the statutes, which merely protects from repeal among other things an accrued right or claim arising under an existing law, is therefore not applicable here.

The new act did not contain an emergency clause and was neither approved nor disapproved by the governor. It became effective therefore under section 55 of the Constitution ninety days after the final adjournment of that session of the legislature or the latter part of June, 1920. The actions were instituted on the 26th day of March, 1920; the answers were filed on the 30th day of April and the judgments appealed from were entered on the 8th day of May, 1920, all before the act became effective under which alone plaintiffs are *now* entitled to a mandamus against appellants. But since, however, the new act which alone repealed the 1916 act under which they were proceeding and then had the right to proceed for mandamus against appellants, did not become effective until after the judgments in their favor were entered, it results that they were then as now entitled to the mandamus granted them, then under the old act and now under the new act. The judgments of the lower court should therefore we think be reversed, but at appellant's costs in this and the lower court, and for proceedings consistent herewith.

It is so ordered.

Lewis v. Commonwealth.

(Decided December 17, 1920.)

Appeal from McCreary Circuit Court.

1. Rape—Carnal Knowledge of Female Under 16 Years of Age.—Carnal knowledge of a female under 16 years of age is prohibited by section 1155, Ky. Stats., and one who admits having had such relations with a female whose age is shown not to have exceeded 16 years at the time, is guilty of the crime condemned by the statute aforesaid.
2. Rape—Extent of Proof of Which Defendant Should Be Apprised—New Trial.—Other than the information conveyed through the

charge set out in the indictment, the Commonwealth is not compelled to apprise defendant of the nature of the proof it intends to introduce and defendant is not entitled to a new trial on the ground of surprise when, assuming the prosecuting witness would claim she was not 16 years old on a given date, he prepares his case accordingly, but upon the trial said witness admitted she was over 16 years old on said date. The only question for the jury was whether the girl was over 16 years of age at the time the crime was committed.

3. A party taken by surprise during the progress of a trial should ask for a continuance and postponement of the case; he cannot go on with the trial and take his chance of a verdict and failing in that then seek a new trial.
4. Criminal Law—New Trial.—Claim of surprise first made on a motion for a new trial comes too late.
5. Criminal Law—New Trial—Newly Discovered Evidence.—The courts should grant a motion for a new trial on the ground of newly discovered evidence when, on account of its materiality and probable effect, a manifest injustice would result from a failure to allow its introduction.
6. Criminal Law—New Trial—Newly Discovered Evidence.—Newly discovered evidence of an impeaching and cumulative nature and not of so controlling a character as is reasonably calculated to have a decisive influence on a retrial, is not ground for a new trial.
7. Criminal Law—New Trial—Newly Discovered Evidence.—To entitle a party to a new trial on the ground of newly discovered evidence, the new evidence must be important and have been discovered after the rendition of the verdict.
8. Criminal Law—Misconduct of Jury—Discharge of Jury.—On a motion to discharge the jury on the ground of misconduct of one of their number where evidence was heard on the motion and this evidence is not before us, the presumption prevails that the conclusion of the trial court in overruling the motion is correct.

STEPHENS & STEELY and JOHN W. SAMPSON for appellant.

CHARLES I. DAWSON, Attorney General, and W. P. HUGHES for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellant, a married man and a grandfather, was indicted, upon trial found guilty and given the minimum term of ten years in the penitentiary for the crime condemned by Kentucky Statutes, section 1155, to-wit, carnally knowing a female under the age of sixteen years.

Accused admitted he had had improper relations with the prosecuting witness on several occasions, some of which took place in the home of his daughter.

He seeks absolution from punishment on the plea that the subject of his lustful acts was over sixteen years of age.

According to the girl's testimony she was only fourteen years old at the time the crime was committed; this is corroborated by her father, nor is there any substantive evidence she was older.

The girl's age thus conclusively established and the illicit conduct admitted, it necessarily follows that appellant is guilty.

A new trial was asked on the ground appellant was taken by surprise in the testimony given by the girl that the sexual relations with her began prior to January, 1919, and because she admitted she was over sixteen years old in January, 1919.

Counsel says that accused thought the girl was going to claim she was under the statutory age on the date last above mentioned and he was prepared to meet such proof by showing she was then over sixteen, and he had prepared his case accordingly. The date of the girl's birth is a fixed event and except for a spiritual birth, one cannot be born again. She could not have changed her birthday. Whether she had attained the age of sixteen at the time referred to was a question for the jury and its verdict of her non-age is supported by the evidence. Other than the information conveyed through the charge set out in the indictment; the Commonwealth was under no duty to apprise appellant of the nature of its proof, and the sufficiency of the indictment is not attacked. *Brock v. Commonwealth*, 33 R. 630, 110 S. W. 878. Furthermore, a party taken by surprise during the trial of a case should ask that the swearing of the jury be set aside and the case postponed, otherwise alleged surprise in the testimony of a witness affords no ground for a new trial. A party surprised cannot go on with the trial and take his chance of a verdict, or, failing in that, seek a new trial. *Liverpool, &c., Ins. Co. v. Wright, &c.*, 158 Ky. 290, 164 S. W. 952; *Sizemore v. Commonwealth*, 189 Ky. 46, 224 S. W. 637.

In the present case the claim of surprise was first made in the motion for a new trial and this was too late.

The discovery of new evidence was also advanced as a ground for new trial. The courts should grant a new trial for this reason when, on account of the materiality

and probable effect of such evidence, a manifest injustice would result from the failure to allow its introduction. But where, as here, the offered testimony is merely of an impeaching and cumulative nature and is not of so controlling a character as would be reasonably calculated to have a decisive influence upon a retrial, or such as would probably change the verdict, it is not error to overrule a motion for a new trial on this ground. *Gravitt v. Commonwealth*, 184 Ky. 429, 212 S. W. 430; *Johnson v. Commonwealth*, 188 Ky. 391, 222 S. W. 106.

Then too the newly discovered evidence must be important and have been discovered since the verdict was rendered. Criminal Code, section 271. It is shown by the affidavit of the county attorney who assisted in the prosecution of the case in the county court, that defendant sought a continuance in that court because of the absence of the identical witnesses, four in number, upon whose statements he now seeks to rely as newly discovered evidence.

This of course he cannot do. *Knight v. Commonwealth*, 170 Ky. 763, 186 S. W. 667; *Home Insurance Co. v. C. N. O. & T. P. Ry. Co.*, 182 Ky. 778, 207 S. W. 487.

Misconduct of one of the jurors is next urged for a reversal. It is claimed that during the progress of the trial, this juror expressed the opinion there was nothing to do but to convict appellant. Criminal Code, section 244, provides that in the trial of offenses other than those involving capital punishment, the court may permit a separation of the jurors until the case is submitted. When this matter was brought to the court's attention by a motion to discharge the jury and continue the case, the record shows that the court, after hearing testimony for and against the motion, overruled same. This evidence is not before us, in its absence we cannot review the action of the court in overruling the motion. Nothing to the contrary appearing, the presumption prevails that the ruling of the trial judge on the motion was correct.

In *Hall v. Commonwealth*, 189 Ky. 72, 224 S. W. 492, will be found a case involving many of the questions raised on the present appeal.

Finding no grounds justifying a reversal of the judgment of conviction same must be and is accordingly affirmed.

Sebree v. Commonwealth.

(Decided January 11, 1921.)

Appeal from Boyle Circuit Court.

1. Criminal Law—Appeal—Instructions—Harmless Error.—On a trial of an agent of a piano company for embezzlement defendant was not prejudiced by the failure of the court to define the word, "fraudulently," as used in the instructions, where the facts constituting a fraudulent conversion were actually submitted to the determination of the jury, and the jury was told by another instruction to acquit the defendant if they believed from the evidence that he, in good faith, kept back or appropriated any of the money or property for his own use, believing that he had a lawful right to do so.
2. Embezzlement—Defense That Corporation Was Not Authorized to do Business in State Not Available.—It is no defense to a charge of embezzlement against an agent of a corporation that the corporation was not authorized to transact business in the state in which the embezzlement occurred.

JOHN W. RAWLINGS and GEO. E. STONE for appellant.

CHARLES I. DAWSON, Attorney General, and EMMETT PURYEAR for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

Warren R. Sebree was convicted of embezzlement and his punishment fixed at four years' confinement in the state penitentiary. He appeals.

Appellant was charged with embezzling certain pianos or their proceeds, the property of the Chase-Hackley Piano Company, a Michigan corporation. According to the evidence for the Commonwealth, Joseph G. Hall, who represented the Chase-Hackley Piano Company as its traveling auditor, came to Kentucky in 1916 and proposed to employ appellant to represent the company in the town of Danville and vicinity. Thereupon, appellant signed a written contract with the company by which the company was to furnish him pianos on consignment and he was to sell same in the above territory on such terms as the company might direct. The contract provided that all money, notes or other property received on the sale of any piano should belong to the company. The pianos were to be billed to appellant at certain prices and he was to receive as his commission

on each sale the excess which he might obtain over and above said price. On cash sales his commissions were due and payable when the company received the pay for the piano. On time sales he was to receive all of the first payment up to \$50.00, while the balance of his commission was to be paid as the company received the money from the purchaser, provided that he was not then indebted to the company. After executing this contract, some twenty odd pianos were shipped to appellant. Several of these he sold and did not account to the company for the proceeds. Two of the pianos which he received were never accounted for.

Appellant's evidence is to the effect that he refused to enter into a consignment contract, but made an agreement with the traveling auditor by which he was to purchase the pianos as a dealer and was not to act as agent of the company. He further says that the auditor made a written memorandum of the latter agreement and sent it on for the approval of the company, assuring appellant that it would be all right for him to proceed with the sale of the pianos in the meantime. After that he, with the approval of the company, used blanks which he himself had drawn, and which stated that the title to the pianos was to remain in him until paid for. While admitting that he sold certain pianos and did not account for the proceeds, he claims that he used the proceeds in his business with the consent of the auditor, and that his equity in other contracts for the sale of other pianos exceeded his indebtedness to the company, and that these contracts were accepted by the company in discharge of his indebtedness. These statements were denied by the auditor.

It is first insisted that the court erred in failing to give the whole law of the case. The instructions are as follows:

1. "If you believe from the evidence in this case beyond a reasonable doubt, that the defendant, Warren R. Sebree, in Boyle county, Kentucky, and before the finding of the indictment herein, unlawfully, wilfully, feloniously and fraudulently, while the agent of the Chase-Hackley Piano Company, and said Company being then and there a corporation organized and doing business under the laws of the state of Michigan, and having its principal office and place of business at Muskegon, in the state of Michigan, and at the said time he

was an agent of said corporation, and had, as agent, in his possession for sale, while he, the said Sebree, was located in Danville, Kentucky, and doing business there for the said company as agent in the disposition and selling of pianos, and having in his possession the following instruments: style 9, No. 73965, consigned at \$185.00, style 18, No. 77239, consigned at \$275.00, style 8, No. 77786, consigned at \$170.00, style 9, No. 74949, consigned at \$185.00, style 7, No. 46871, consigned at \$140.00, style C, No. 59032, consigned at \$115.00, style 18, No. 74473, consigned at \$275.00, style 8, No. 76751, consigned at \$170.00, style 8, No. 79614, consigned at \$175.00, for the purpose of selling same for cash and cash notes secured by a lien upon the instruments sold, and subject to the approval of said company, and for no other purpose and no sum less than the above specified, sold and traded the above instruments or any of them to various persons and appropriated the proceeds thereof wilfully, feloniously and fraudulently to his own use with the intent to deprive said company of the same and of its property, money and effects, and that said proceeds came to his hands as agent and sales agent of said company and were placed in his possession and under his care and management as such agent, and he wilfully and fraudulently and feloniously converted the same to his own use and benefit, without the knowledge or consent of said corporation and against its consent, with the intent and purpose of fraudulently depriving it thereof, then you will find defendant guilty and fix his punishment at confinement in the state penitentiary for not less than one year nor more than ten years, in your discretion.

2. "If you have a reasonable doubt from the evidence, of the defendant's having been proven guilty, you will find him not guilty.

3. "If you believe from the evidence in this case that the defendant was not acting as agent of the corporation, the Chase-Hackley Company, or that he had purchased the pianos in question outright, you will find for the defendant.

4. "If you believe from the evidence that the defendant in good faith kept back or appropriated any of the money or property for his own use, believing that he had the legal right so to do, you will find for the defendant."

The particular complaint is that the court failed to define the word, "fraudulently." It is true that under the peculiar facts of the case of *Taylor v. Commonwealth*, 119 Ky. 731, 75 S. W. 244, it was held prejudicial error not to define the word "fraudulently." However, it will observed that in this case before the jury could convict the appellant, they were required to believe from the evidence that he was the agent of the corporation, that the pianos came into his possession for the purpose of sale, that he sold or traded the same and that the proceeds came into his hands as such agent, and that "he wilfully and fraudulently and feloniously converted the same to his own use and benefit, without the knowledge or consent of said corporation and against its consent, with the intent and purpose of fraudulently depriving it thereof." It will thus be seen that the facts constituting a fraudulent conversion were actually submitted to the determination of the jury. Not only so, but the court further told the jury to acquit the defendant if they believed from the evidence that he, in good faith, kept back or appropriated any of the money or property for his own use, believing that he had a lawful right to do so. It seems to us, therefore, that these two instructions fully advised the jury as to what would constitute a fraudulent conversion, and appellant was not prejudiced by the failure of the court to define the word, "fraudulently."

Another contention is that the Commonwealth failed to show by competent evidence that the Chase-Hackley Piano Company had complied with section 571, Kentucky Statutes, making it unlawful for any corporation to carry on any business in this state until it shall have filed in the office of the secretary of state a statement signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat, upon whom process can be served. We deem it unnecessary to decide whether the fact of filing was properly proved. The rule that one who receives money or other thing of value, in the assumed exercise of authority as agent for another, is estopped thereafter to deny such authority, applied in criminal prosecutions as well as in civil cases. Thus, it has been held that it is no defense to a charge of embezzlement against an agent that the corporation obtained the property illegally, *State v. Hoshor*, 26 Wash.

653, 67 Pac. 386, or could not own such property under the statute, *Leonard v. State*, 7 Tex. App. 417, or that it entrusted the property to the agent for the purpose of hindering its creditors, *People v. Ward*, 134 Cal. 301, 66 Pac. 372, or for use in gaming or other illegal purpose. *State v. Shadd*, 80 Mo. 358; *Commonwealth v. Cooper*, 130 Mass. 285. Following this view of the law, the courts are agreed that it is no defense to a charge of embezzlement against an agent that the corporation was not authorized to transact business in the state in which the embezzlement occurred. In such a case the rights of the Commonwealth are involved, and the wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. 9 R. C. L. 1298; *State v. Blakemore*, 226 Mo. 560, 126 S. W. 429, 27 L. R. A. (N. S.) 415; *State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252; *State v. Pohlmeier*, 59 Ohio St. 491, 52 N. E. 1027; *State v. Tumay*, 81 Ind. 559; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736.

Not finding in the record any error prejudicial to the substantial rights of the appellant, we are not at liberty to reverse the judgment.

Judgment affirmed.

Whole court sitting.

Hickerson v. Masters.

(Decided January 11, 1921.)

Appeal from Washington Circuit Court.

1. Libel and Slander—Slander—Words Actionable Per Se—Words Charging Fornication.—To say of one that he is a whoremaster is not actionable per se, since it amounts only to a charge of fornication, which is not an infamous crime, but only a misdemeanor punishable by fine.
2. Libel and Slander—Slander—Words Actionable Per Se.—To say of one that he is a whoremaster is not actionable per se as a charge of the statutory offense of pandering.
3. Libel and Slander—Slander—Words Actionable Per Se—Words Charging a Minister With Immorality.—A charge of immorality against a minister is actionable per se without a colloquium that the words were spoken of him in his professional capacity.

JOSEPH POLIN, JOHN A. POLIN and W. F. GRIGSBY for appellant.

W. C. McCHORD and J. H. McCHORD for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Reversing.

R. J. Hickerson sued Howard Masters for slander. From a judgment sustaining a demurrer to, and dismissing the petition, plaintiff appeals:

The petition is as follows:

“The plaintiff, R. J. Hickerson, states that he now is, and was at all times hereinafter complained of, a duly ordained minister of the Gospel, that being his profession and calling in life.

“Plaintiff states that the defendant, Howard Masters, well knowing this fact, and wilfully, maliciously, wickedly and unlawfully, intending to injure plaintiff in his social and professional standing, and to impute to him unfitness to perform his duties as a minister of the Gospel and to prejudice him in said profession, did, in Washington county, Kentucky, on or about the — day of September, 1919, and in the presence and hearing of divers and different persons speaking to plaintiff’s father of and concerning plaintiff falsely, maliciously, wrongfully and unlawfully used these words, to-wit: ‘Well, I see your boy is home. I saw him in town the other day and sized him up, and he is nothing but a whore-master.’ Meaning thereby that plaintiff had committed and was guilty of the crime of pandering as defined by chapter 49, page 499, of the Acts of the Kentucky General Assembly 1916, now section 1215b-2, vol. 3, Carroll’s Kentucky Statutes, and meaning also that plaintiff is one who procures or keeps whores for others and that he provides whores for the gratification of the lusts of others, and that plaintiff is a man who practices lewdness, and is guilty of the crime of fornication.

“Plaintiff says that he makes his living as a minister of the Gospel and that said language, which is false and untrue, has greatly injured his social and professional reputation and has caused him to suffer great mental anguish and humiliation, to his great damage in the sum of ten thousand dollars.

“Wherefore, plaintiff prays judgment against the defendant, Howard Masters, for ten thousand dollars, for his costs herein expended and for all proper relief.”

No special damages being alleged, the sufficiency of the petition turns on whether the words complained of are actionable *per se*. Spoken words are actionable *per*

se only when they are false and (1) impute the commission of a crime involving moral turpitude for which the party might be indicted and punished; or (2) impute an infectious disease likely to exclude him from society; or (3) impute unfitness to perform the duties of an office or employment; or (4) prejudice him in his trade or profession; or (5) tend to disinherit him. *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610, 40 L. R. A. (N. S.) 1033. It is claimed that this case falls under classes (1) and (4). Even if it be conceded that the words charge plaintiff with the offense of fornication, they are not actionable *per se*, for fornication is not an infamous crime within the meaning of the rule, but a mere misdemeanor punishable at most by a fine of \$50.00. Section 1320, Kentucky Statutes, *Morris v. Barkley*, 1 Litt. 64, when properly understood, does not announce a contrary rule. While it did hold that a charge of fornication against a man was actionable *per se*, the opinion was based solely on the act of 1811 which provided, "that hereafter every charge of incest, fornication or adultery, made by any citizen of this Commonwealth against one of the female sex, shall be placed on the same footing as other charges of a criminal nature for which an action will lie, according to the principles of the common law; and that all and every person or persons, for whom an action would lie, for the speaking of scandalous words, may have and maintain an action of slander, for the speaking of words containing a charge of the commission of the offenses aforesaid, or any of them, subject to the like principles, rules and regulations as are observed in other actions for slanderous words." 4 Litt. 385. Since that time the act has been repealed and re-enacted so as to leave out the provision with reference to "every person," and reads as follows: "A charge of incest, fornication or adultery against a female shall be actionable; and in such cases, the plaintiff shall not be held to allege or prove special damages." Were it not for this statute, a charge of fornication against a female would not be actionable *per se*. *Pollard v. Lyon*, 91 U. S. 225; *Martin v. White*, 188 Ky. 153, 221 S. W. 528.

But it is insisted that the language is sufficient to charge plaintiff with the offense of pandering, which is an infamous crime. Sec. 1215b-2, vol. 3, Kentucky Statutes. The ordinary and usual meaning of whoremaster

is one who practices lewdness. While the dictionaries give the word a secondary meaning of "one who keeps or procures whores for others; a pimp; a procurer," we are clearly of the opinion that this is not the usual and ordinary acceptation which is always controlling in the absence of special circumstances showing that the word was used in a different sense. Hence, we conclude that the language employed does not clearly and unequivocally import that plaintiff was guilty of the crime of pandering.

It remains to determine whether the words were such as to prejudice plaintiff in his profession of minister. It is the general rule that words tending to prejudice one in his profession are only actionable *per se* when spoken of him in his professional capacity, but the authorities make a distinction in the case of a minister and hold that a charge of immorality against him is actionable *per se* without a colloquium referring to his calling. Chaddock v. Briggs, 13 Mass. 248, 7 Am. Dec. 137; Morasse v. Brocher, 151 Mass. 567, 21 A. S. R. 474; McMillian v. Birch, 1 Binney 178, 2 Am. Dec. 476; Hogg v. Dorrah, 2 Porter 212. The reason for the distinction is that a minister being both a teacher and an exemplar of morality, there is no time when he is not engaged in the pursuit of his calling. It is not possible, therefore, to draw a line of demarcation between his conduct as a minister and his conduct as a man. On the contrary, his deportment should at all times conform to the standard of purity required by his religion. An immoral man cannot be a successful minister. Destroy the people's confidence in his morality, whether in the pulpit or out, and you end his career as a minister. Hence a charge of immorality necessarily touches a minister in his calling and is actionable *per se* without an allegation that the words were spoken of him in his professional capacity. It follows that the demurrer to the petition should have been overruled.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

Gordon v. Commonwealth.

(Decided January 11, 1921.)

Appeal from Boyle Circuit Court.

1. Criminal Law—Accomplices.—An accused cannot be convicted of a crime on the testimony of an accomplice alone. In order to convict him there must be other evidence, in addition to that of the accomplice, of such character as will tend to show, not only that the crime was committed, but that it was committed by him, or that he participated in its commission.
2. Criminal Law—Accomplices—Corroboration.—On an appeal of the defendant in a criminal case, seeking the reversal of a judgment of conviction on the ground that it was illegally obtained upon the insufficiently corroborated testimony of an accomplice, the test applied by the appellate court of the sufficiency of the corroboration of the testimony of the accomplice, is to eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witnesses with a view to ascertain whether there be inculpatory evidence, i. e., evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated.
3. Criminal Law—Accomplices—Corroboration.—As the application of the test, *supra*, to the evidence furnished by the record on this appeal convincingly shows a sufficient corroboration of the testimony of the accomplice, and even without that of the latter, authorized the verdict of the jury finding the appellant guilty of the crime of knowingly receiving stolen property, charged in the indictment, the judgment of conviction entered thereon, is free of error.

C. C. BAGBY, JOHN S. OWSLEY and BAGBY & HUGUELY for appellant.

CHARLES I. DAWSON, Attorney General, and T. B. MCGREGOR, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, Howard Gordon, under an indictment charging him with that crime, was tried and convicted in the Boyle circuit court of knowingly and feloniously receiving stolen property of greater value than \$20.00; the punishment imposed by the verdict of the jury and judgment of the court, being three years' confinement in the penitentiary at hard labor.

Although several other grounds were filed in support of appellant's motion for a new trial made in the

circuit court, the only one urged on this appeal by his counsel for a reversal of the judgment of the circuit court, is that the evidence was insufficient to authorize his conviction for which reason it is claimed, the refusal of that court to peremptorily direct his acquittal by the jury at the conclusion of the evidence, as requested by him, is reversible error.

The stolen property consisted of fourteen cases of cigarettes, known as the "Lucky Strike" brand, which with other cases of like brand were shipped to certain consignees, purchasers, at Englewood and Chicago, Illinois, and Pontiac, Michigan, by the American Tobacco Company from its plant in Reidville, North Carolina, in a freight car No. 1003033 of the Louisville and Nashville Railroad Company attached to a freight train of the Southern Railway Company, which from Tennessee to Danville and Lexington, Kentucky, ran upon and over the tracks of the Cincinnati, New Orleans and Texas Pacific Railroad Company. When the cigarettes were loaded at Reidville, North Carolina, the car was secured by a lock of the Southern Railway Company and a seal containing the brand of the American Tobacco Company, and upon its arrival at Danville inspection of it by the car inspector in the station yards showed that it was locked and the seal unbroken. The car, however, remained in Danville on a yard track several hours before starting again on the way to Chicago and while there, before day on the morning of May 10, 1920, was broken into and the fourteen boxes of cigarettes taken therefrom. The person or persons by whom the cigarettes were taken effected an entrance into the car by forcibly breaking the seal and lock, and replacing the lock with an old one formerly used by the Illinois Central Railroad Company. The breaking of the car and theft of the cigarettes were not discovered until the arrival at Lexington of the car and train to which it was attached May 10, the discovery being made immediately after the train reached Lexington by a car inspector charged with the duty of examining each car composing the train. No opportunity was afforded to any person of breaking into the car during the short run of the train from Danville to Lexington, which was made in the forenoon of May 10, with only one brief stop. The discovery of the breaking into the car and theft of the cigarettes was soon followed by the arrest and subsequent indictment of ap-

pellant and certain other persons for receiving the cigarettes, knowing them to be stolen property.

The facts thus far stated were established by evidence which was wholly uncontradicted.

John McKenzie, introduced as a witness for the Commonwealth, testified that at the time of the car breaking and theft of the cigarettes he was employed as a "car knocker" in the Danville depot yards; that he at appellant's request, before the breaking of the car and taking of the cigarettes, gave him the number of the car; and though he did not see the car broken into, he did later, and before daylight on the morning of May 10, see appellant and two or three other persons, whom he failed to identify, removing boxes from the car in question and loading them in an automobile, in which they seated themselves and rode away, taking the boxes with them. McKenzie also testified that on the same or next day appellant gave him some "Lucky Strike" cigarettes, which was the brand stolen from the car and later gave him \$50.00, telling him it was a part of the money he (appellant) had realized from the sale of the cigarettes.

It is insisted for appellant that, though uncontradicted, the testimony of McKenzie shows him to have been an accomplice of appellant in the commission of the crime charged in the indictment, and that other evidence heard on the trial in behalf of the Commonwealth was not sufficiently corroborative of his testimony to establish appellant's guilt of the offense charged. Consideration of the evidence other than that furnished by the testimony of McKenzie, will show this contention to be without merit. Before referring to it, however, we will concede that McKenzie was an accomplice of the appellant in the meaning of the Criminal Code, section 241, declaring that:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows that the offense was committed, and the circumstances thereof."

The fact that McKenzie was an accomplice is shown by his own admissions; and that he was so regarded by the trial court, is shown by its properly giving the jury an instruction containing in the same language the provisions of the section of the Code, *supra*. But as ap-

provingly said in *Commonwealth v. McGarvey*, 158 Ky. 570: "In the note to *Stone v. State*, 98 Am. S. Rep. 169, is found a good test of the sufficiency of corroboration of the testimony of an accomplice, quoted from *Weldon v. State*, 10 Tex. App. 400, 'eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witnesses with a view to ascertain whether there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated.'"

Let us now see what would result from the application of this test to the facts of the instant case. As previously stated, we find that the felonious breaking into the car and taking therefrom of the cigarettes, whether done by appellant or others, is shown by uncontradicted evidence, exclusive of the testimony of McKenzie. In addition, it was shown by the testimony of each of three witnesses, Sanders, Harlan and Caldwell, that a number of boxes or cases of cigarettes of the same brand as those stolen from the car, were in the possession of appellant and secreted at his home immediately after the stealing of cigarettes from the car, and that the cigarettes or the greater part of them in appellant's possession were sold by him shortly thereafter to two or more retail dealers, such sales, according to the testimony of the purchasers, being at prices, per box or case, less than half the market prices paid by retail dealers for such cigarettes.

It also appears from the testimony of Sanders, Harlan and Caldwell that the cases or boxes of cigarettes when sold by or for appellant, were by his orders delivered to the purchasers by taking them to their places of business through the back doors or entrances thereof; and further, that some of the cases of cigarettes thus sold and delivered were later identified and recovered by officers of the law as a part of the cigarettes stolen from the car. As it appears from the evidence that these sales were made for appellant by the witness Sanders; if it be claimed that this made him an accomplice, it is a sufficient answer to say that all the foregoing facts were as fully established by the testimony of Harlan and Caldwell as by that of Sanders, and many of them also by the purchasers of the cigarettes. Harlan and Caldwell, without knowledge of how appellant became possessed of the cigarettes, were merely employed by the

latter to assist Sanders in delivering the cigarettes when sold, and this they did by hauling them to the purchasers in Caldwell's automobile which was hired by appellant for that purpose. We have found nothing in the record that connects, Harlan, Caldwell or the purchasers of the cigarettes with the commission of the crime charged in the indictment, but the indisputable fact that the cigarettes in appellant's possession and which he, in large part, sold, were those, or a part of them, stolen from the car, together with the secrecy employed by him in holding and disposing of them, as well as the great sacrifice in price at which he sold them, all conduced to prove, either that they were stolen by him or that he otherwise obtained them with the knowledge that they had been stolen and with like knowledge sold them, intending both in receiving and selling them to feloniously deprive the owners thereof. So in view of the facts and circumstances referred to, the evidence of which from other witnesses and circumstances was sufficiently corroborative of the testimony of McKenzie and also that of Sanders, if the latter be deemed an accomplice, to compel the submission of the case to the jury. Furthermore, appellant introduced no evidence explanatory of his possession of the cigarettes.

Whether the evidence appearing in the record would have authorized the conviction of the appellant under an indictment for breaking into the car and stealing the cigarettes we need not decide. It is only necessary for us to say that in our opinion under the indictment returned for the lesser degree of that offense, it did authorize the appellant's conviction. Other grounds urged for a new trial in the court below, will not be discussed, further than to say that in our opinion none of them presents any reason for a reversal of the judgment. Moreover, as they are not relied on by appellant's counsel on this appeal, we can but assume that they have been abandoned. Judgment affirmed.

Shuttles v. Commonwealth.

(Decided January 11, 1921.)

Appeal from Boyle Circuit Court.

1. **Receiving Stolen Goods—Indictment and Information—Variance.**
—In an indictment for receiving stolen goods it is only necessary

that the owner of the goods be named and a variance is immaterial where the indictment specifically describes the property stolen which it charges the defendant with receiving.

2. Receiving Stolen Goods—Indictment and Information—Sufficiency.—In an indictment for receiving stolen goods it is not necessary to allege that it was the purpose of defendant to permanently deprive the owner of the use thereof, where it is averred that the receiving of the goods was done unlawfully, wilfully and feloniously.
3. Criminal Law—Accomplices—Corroboration.—The case was properly submitted to the jury as the evidence of the accomplice was sufficiently corroborated.

JOHN S. OWSLEY, J. W. HARLAN, CHENAULT HUGUELY and C. C. BAGBY for appellant.

CHAS. I. DAWSON, Attorney General, and T. B. MCGREGOR, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Appellant Shuttles, who was convicted in the Boyle circuit court for the crime of knowingly receiving stolen goods and his punishment fixed at five years' confinement in the penitentiary, appeals to this court seeking a reversal of the judgment upon the grounds: (1) Variance between the averments in the indictment and the evidence; (2) the indictment was insufficient in several particulars; (3) the instructions of the court to the jury were erroneous.

The indictment accuses Shuttles of feloniously receiving a large number of cartons of cigarettes stolen from the possession of the Southern Railway Company or the Cincinnati, New Orleans & Texas Pacific Railway Company, common carriers, in February, 1920. At that time the railroads were under the control of the Director General of Railroads of the United States, and it is argued in brief of counsel for appellant that since the railroads were in the possession and under the control of the Director General that the goods, if stolen, were not so taken from the Southern Railway Company or the C., N. O. & T. P. Railway Company, as averred in the indictment and as the evidence tends to show. The Southern Railway Company, although in the possession and under the control of the Director General, did not lose its entity or identity, and it was possible for the theft to have been committed by taking the property from that corporation even though it was under the con-

trol of the Director General. The same is true of the C. N. O. & T. P. Railway Company. Aside from this there is no merit in this contention, for we have held in more than one case that the owner of goods need not be named in an indictment, under section 1199, and further that if named, a variance is immaterial if the indictment specifically describes the property stolen and which it charges the defendant with receiving, knowing the same to have been stolen. *Commonwealth v. McGarvey*, 158 Ky. 570; *Newton v. Commonwealth*, 158 Ky. 4.

The second objection to the indictment is based upon its failure to allege that Shuttles received said goods with the intention of permanently depriving the owner of the use thereof. Such an averment is wholly unnecessary in an indictment for this crime where it avers that the receiving of the stolen goods was done unlawfully, wilfully and feloniously, as in this case. Such an averment would be necessary in an indictment for larceny, but the gravamen of this crime is knowingly and wilfully receiving goods known by the receiver to have been stolen, all of which must be with a felonious intent. When one knowingly receives stolen goods he is guilty of the offense denounced by section 1199, if he does so feloniously. It is not, therefore, necessary for the indictment to allege that the receiver of the stolen goods acted with a purpose to permanently or at all deprive the owner of the goods.

Appellant next insists that the court should have directed the jury to find and return a verdict finding him not guilty because the material allegations of the indictment were not sustained by the proof. The gist of this contention is that the evidence of McKenzie, an accomplice who testified for the Commonwealth, was not corroborated in many particulars and being unsupported was insufficient to warrant the court in submitting the case to the jury. With this contention as to lack of corroboration we do not agree. The evidence shows that the cigarettes which were stolen from the railway company at Danville, Kentucky, were packed in paper cartons at Winston Salem, N. C., and there loaded in a certain B. & O. car and consigned to Kansas City, Missouri; that the cartons were each marked by the shipping clerk in such way as to be identified. Before the car left Winston Salem, N. C., it was sealed both by the railway

company and the shipper of the cigarettes. When it arrived at Danville, Kentucky, the seals were unbroken, but within a few hours after its arrival at Danville and before it left next morning the seals were broken and it was again sealed by the railway company before leaving Danville. On reaching its destination at Kansas City the car was examined and found to be sealed, but when opened a number of cartons of cigarettes were missing, thus establishing beyond doubt that the theft was committed at Danville, Kentucky. The car arrived at Danville in the early morning hours of February the 23rd, 1920, and it left that point about 8:30 o'clock a. m. While the consignment of cigarettes was in the Danville railroad yards one Stringer applied to a citizen of the city named Goode to be allowed to store some packages in his coal house or wood house. This application was made at night time and the permission granted. Next day Goode testifies he discovered a large number of packages of the character in which the cigarettes were packed, stored in his coal house. They were in the way and he requested Stringer to remove them. At a late hour that night Goode was aroused by the noise of an automobile near his coal house, and getting up he discovered that a man named McKenzie with two other persons were loading these cartons of cigarettes into the automobile. He recognized the voice of one of the other men as that of Robert Shuttles, a brother of appellant. Next day the cartons of cigarettes were gone. These same cartons of cigarettes were found concealed in the room of appellant. Other witnesses testify to the transfer of cartons containing cigarettes from the room in which appellant lived, to the Curry Grocery Company, a wholesale concern at Harrodsburg, and it is established by that concern that it purchased a large quantity of cigarettes from appellant, paying him therefor by check, \$1,050.00, and the cigarettes thus purchased were the same brand as those stolen at the Danville railway yards, and the cartons bore the initials and other identification marks placed on the cartons shipped from Winston Salem in the B. & O. railroad car consigned to Kansas City, and which was broken open at Danville, and appellant was wholly unable to satisfactorily show from whom he obtained so large a quantity of cigarettes nor why he had them stored in his room.

McKenzie, testifying for the Commonwealth, admits that he was an accomplice, relating the facts with reference to the location of the car containing the cigarettes in the Danville railway yards and the spotting of it by Stringer who is charged with the theft. He further testified to assisting his brother, Robert Shuttles, and Stringer in removing the cigarettes from the coal house of Goode in the night time to the room of appellant, who received them and immediately cut off the label so as to prevent identification. This, he says, happened after twelve o'clock at night. He further says that he received a considerable sum of money for his part in the affair. All this is denied by appellant but it is sufficiently corroborated by other proven facts as to make it well nigh overwhelming and to leave no doubt of the guilt of appellant.

We think the provisions of section 241 of the Criminal Code, requiring the evidence of an accomplice to be corroborated, were sufficiently complied with and that the court did not err in so holding and submitting the case to the jury.

The indictment does not accuse Robert Shuttles and John A. McKenzie, or either of them, of the theft, nor does it name anyone as the thief, but it does charge that Shuttles and McKenzie were in possession of the stolen goods and that Clyde Shuttles received the stolen goods from his brother and McKenzie with the knowledge that the goods had been stolen. The court, therefore, instructed the jury that if it believed from the evidence beyond a reasonable doubt that Clyde Shuttles before the finding of the indictment unlawfully, wilfully and feloniously received and accepted from Robert Shuttles and John A. McKenzie, or either of them, a lot of cigarettes of the Camel brand which was then and there of value greater than twenty dollars, and which had been stolen from the C. N. O. & T. P. Railway Company and the Southern Railway Company, or either of said companies, and that said companies were in possession of said cigarettes as common carriers for transportation and delivery, and which cigarettes were not the property of Robert Shuttles and John A. McKenzie, or either of them, and were taken against the will and without the consent of said carrier or carriers, or the owners thereof, and that Clyde Shuttles at the time he received said goods knew that same had been stolen and were unlaw-

fully in the possession of Robert Shuttles and John McKenzie, or either of them, and received said cigarettes with the felonious intent to convert the same to his own use and permanently deprive the owners of same against their consent, to find the defendant guilty. This instruction was more favorable to appellant than the law warrants. The court also told the jury that a conviction could not be had upon the testimony of John A. McKenzie, an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof. In addition to this the court gave the usual instruction on reasonable doubt. The jury was, therefore, well advised as to the law of the case.

Under section 1199, whoever receives stolen goods, the stealing whereof is punished as a felony or misdemeanor, knowing the same to be stolen, shall be liable to the same punishment to which the person stealing the same is by law subjected. The language of this statute does not admit of the construction sometimes put upon a somewhat similar statute by courts of other states, wherein it is held that the receiving of stolen goods must be from the thief himself, and not from another person who received them from the thief. We can think of no reason why such a construction should be placed upon this statute, or one of a similar import. The intention of the legislature in enacting it was to prevent persons from knowingly and feloniously receiving stolen goods, whether from the thief himself or from one who had received them from the thief. It would make no difference through how many hands the stolen goods passed, if the person charged with receiving them did so knowing same to have been stolen. The terms of our statute, section 1199, are so broad as to exclude the idea that the goods must be received from the thief himself, for it says, "whoever shall receive any stolen goods, the stealing whereof is punished as a felony or misdemeanor, shall be liable to the same punishment to which the person stealing the same is by law subjected." No intimation whatever is given that the goods must be received from the thief. We, therefore, think the contention of appellant that the appellant should have been discharged because the stolen cigarettes were not re-

ceived by him from Stringer but from others, is without merit.

No error appearing to the prejudice of appellant the judgment is affirmed.

Marquette v. Marquette's Executors, et al.

(Decided January 14, 1921.)

Appeal from Pendleton Circuit Court.

1. **Wills—Construction—Intention of Testator.**—The cardinal rule in the construction of wills is to ascertain, if possible, from the language in the entire will the intention of the testator, and to construe it so as to carry out that intention; but, the intention thus to be arrived at is the one which the testator expressed by the language used and not the one which he intended to but did not express.
2. **Wills—Construction—Intention of Testator.**—Where from the language employed in the entire will, there exists an uncertainty, repugnancy, or an apparent ambiguity, it is competent for the court to permit testimony showing the surrounding circumstances and conditions of the testator at the time he executed his will, for the purpose, if possible, of ascertaining his intention; but where the language employed in its ordinary and usually understood meaning is free from uncertainty, extraneous evidence will not be resorted to.
3. **Wills—Signification of Word Children—Intention of Testator.**—The primary, usual and ordinarily legal signification of the word "children" is "legitimate children," and the term as used in a will will not include illegitimate children, unless it expressly, or by necessary implication appears from the will itself that it was the intention of the testator to include in the word "children," illegitimate children.

C. C. ADAMS for appellant.

SWINFORD & BARKER for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

J. J. Marquette died testate and a resident of Pendleton county. His will, which was probated after his death, named the appellees and defendants below, J. W. and L. R. Marquette, as executors thereof and at the time designated in the will (which was after the widow's

death) they qualified as such. After devising all of his property, both real and personal, to his wife for life and making a specific devise to his son, Columbus, the will contains this residuary clause:

“To the rest of my children, the remainder of my property, less three hundred dollars (\$300.00), which is to be used to purchase a monument for myself and wife, both personal and real is to be divided equally among them after deducting any indebtedness they may owe me.”

The testator had by his wife, who survived him and to whom he was lawfully married, eleven children and under the terms of the will the property mentioned in the residuary clause would be divided into ten equal parts. The executors, after collecting all the assets, paying the debts and specific devises, had a balance in their hands for distribution the sum of \$6,455.19, which they divided equally among the ten children entitled to share under the residuary clause. The testator owned several tracts of land, none of which had been divided at the time of the filing of these two suits by appellant and plaintiff below, John L. Marquette, against the executors and the other children of the testator, by one of which he sought to assert his right to a one-eleventh interest in the personalty of the testator, and by the other one he sought to assert a similar interest in the real property and to have it sold for the purpose of division. The two suits were consolidated and tried together in the court below and will be so disposed of in this court. In his petitions the plaintiff alleged that he was a child of the testator and entitled under his will to share in his estate with the other children. The answer denied all the allegations of the petition and alleged in substance that plaintiff was the child of a woman to whom the testator was never married and with whom he never cohabited, nor did he ever recognize her as his wife, and that the only woman to whom the testator was ever married was the mother of defendants by whom he had the children among whom the executors had divided the personalty and the only ones who were entitled thereto or who were entitled to any interest in the realty. A demurrer to the answer was overruled and a reply filed by plaintiff admitted his illegitimacy but alleged in a second paragraph that:

"The plaintiff, John L. Marquette, states that a short while after he was born, and while he was an infant of very tender years, his father, the said John J. Marquette, gave unto the plaintiff his name, took him into his home and family, and ever afterwards, acknowledged, claimed and recognized the plaintiff to be his own, truly begotten child; that his father, J. J. Marquette, his father's wife, the mother of defendants, and his father's said other children, both publicly and privately, on all occasions, and in every conceivable way, constantly and continuously acknowledged, recognized, and held the plaintiff out to all persons to be a child of the said John J. Marquette, and a brother of his said other children; that he was nurtured, clothed, sheltered, taught and educated, at school and church, and always given a full share and status in his father's home and family and socially, and in every other way, accorded the same privileges, protection, care, attention and admonition as his father's said other children; and the plaintiff states that he continued to reside with his father, and his father's wife, and other children and did live with them and made his home therewith continuously until long after he attained his age of majority, and during all of said period, the plaintiff states, working with his father's said other children, that he loyally and devotedly assisted his father in the accumulation of the estate and property left by him for distribution on his decease.

"The plaintiff states that his father John J. Marquette, never ceased to acknowledge, recognize and claim the plaintiff to be one of his children, but that, until the time of his death, he constantly regarded the plaintiff to be his own child, always recognized and referred to the plaintiff as one of his children, and often stated to this plaintiff, and on divers occasions, frequently declared to many persons, both before and after the making of his said last will and testament, that it was his settled purpose and intention to have this plaintiff participate and share equally with his said other children in the distribution of his property and estate, and the plaintiff avers that it was intended by his father in the execution of the said instrument and testament to give to this plaintiff the same share in his said estate that he gave to the other children therein."

The demurrer filed by defendants to the reply was sustained and plaintiff declining to plead further his

petitions were dismissed and to reverse that judgment he has appealed.

The question very sharply presented is, whether it is competent to show by extrinsic evidence that the testator meant by the expression "my children" to include an illegitimate child, or whether it, standing alone, without anything appearing *in the will* to the contrary, will be conclusively presumed to embrace only legitimate children? In answering the question it is indispensably necessary to remember that the cardinal rule for the interpretation of wills, everywhere recognized, is to ascertain and administer the intention of the testator as gathered from the entire will, or as has been sometimes expressed, from its "four corners." *Shields' Executor v. Shields*, 185 Ky. 249; *Radford v. Fidelity & Columbia Trust Co.*, *idem.* 453; *Hughes v. Cleveland Jewish Orphanage Asylum*, 184 Ky. 461; *Sauer v. Taylor's Executor*, *idem.* 609; *Greenwell v. Whitehead*, *idem.* 74; *Phelps v. Stoner's Admr.*, *idem.* 466; *White v. White*, 150 Ky. 283; *Eichorn v. Morat*, 175 Ky. 80; *Wickersham v. Wickersham*, 174 Ky. 604; *Fowler v. Mercer's Executor*, 170 Ky. 353; and *Prather v. Watson*, 187 Ky. 709. But *the intention* of the testator which the court must ascertain from the will, and administer, is that which is expressed by what he did say and not what he may have mentally entertained and intended to say but did not. *Shields*, *Wickersham*, *Fowler*, *Mercer*, *Eichorn* and *Prather* cases, *supra*, and 40 Cyc. 1386-1387. In other words, the intention which the court seeks is the one which is manifested by the language which the testator employed in drafting his will, and in arriving at the meaning of his language the usual, primary and commonly understood signification of the words employed will be given to them, *unless* some contrary signification, either expressly or by necessary implication, appears from the whole will. *Compton v. Compton*, 167 Ky. 657; *Dixon v. Dixon*, 180 Ky. 423, and 40 Cyc. 1396. This rule is thus stated in the volume of Cyc. referred to:

"A testator is presumed to use the words in which he expresses himself in his will in their primary or ordinary sense, and in construing the will the words employed are to be taken in that sense, unless it is manifest from the context of the whole will, or from the subject matter, that the testator intended to use them in a different sense, or unless a reading of the words in their primary

or ordinary sense will lead to some absurdity, repugnancy, or inconsistency with the declared intention of the testator as ascertained from the whole will, in which case the natural and ordinary meaning of the words may be modified, extended, or abridged. Where the words when given their natural, ordinary, or popular meaning are plain and unambiguous, and show a clear intention on the part of the testator, they must be given that meaning notwithstanding their effect, and such meaning cannot be departed from for the purpose of giving effect to what it may be supposed was the intention of the testator, or merely because they lead to consequences which are capricious or even harsh or unreasonable."

What might be termed a secondary or subsidiary rule for the interpretation of wills is the one which permits courts to place themselves, by extraneous testimony, in the position and surrounding circumstances of the testator at the time he executed his will, but this rule applies only when there appears from the language of the will itself some uncertainty, ambiguity or repugnancy, which it is necessary to resolve and settle in order to ascertain what the testator meant. It is never resorted to when the language is plain and unambiguous, however harsh, capricious or unreasonable the consequences might be. It is only under such conditions that the secondary or subsidiary rule now under consideration was resorted to by this court in the cases, *supra*, the most extreme one perhaps, being the Eichorn case. In that case the testatrix designated her devisee by the use only of the pronouns "he" and "him." It was held in the opinion that it was competent to show the surrounding circumstances and conditions of the testatrix to ascertain what particular male person she referred to by the use of the masculine personal pronoun. It is therein shown that the authority to resort to extrinsic proof in similar cases is thoroughly established and upheld by all courts and text writers. The cases of *Reuling v. Reuling*, 137 Ky. 637; *Buschemeyer v. Klein*, 139 Ky. 124, and *Commonwealth v. Manuel*, 183 Ky. 48, cited and relied on by counsel for appellant, announce no conflicting doctrine, but on the contrary the opinions are in complete harmony with what we have herein stated.

In the light of these thoroughly settled rules, whom did the testator in this case mean to include by the ex-

pression "my children" as used in the residuary clause of his will? The primary, usual, ordinary and legal signification of the word "children" as used in a will is "legitimate children" and it will not include illegitimate children "unless the testator's intention to include them is clear, either by express designation or necessary implication." 40 Cyc. 1451; 11 Corpus Juris 762; Heater v. Van Auken, 14 N. J. Eq. 159; Tuttle v. Woolworth, 74 N. J. Eq. 310; note in 47 L. R. A. (N. S.) 534, and cases referred to; Ferguson v. Mason, 2 Sneed (Tenn.) 618; Appel v. Byers, 98 Pa. St. 479; note in American Annotated cases 1915B, page 51, and cases referred to; Harrold v. Hagan, 147 N. C. 111, 125 Amer. St. Rep. 539; Sullivan v. Parker, 113 N. C. 301; Kemper v. Fort, 219 Pa. 85, 13 L. R. A. (N. S.) 820, 123 Amer. St. Rep. 623; Brisban v. Huntington, 128 Iowa 166; In re Truman, 27 Rhode Island 209, and Elliott v. Elliott, 117 Indiana 380. We find nothing in the case of Harness v. Harness, 98 N. E. R. (Ind.) 537, or in any of the other cases referred to by appellant's counsel, in conflict with the above rule. Illustrating such want of conflict we will refer briefly to the facts of the Harness case. There the testator devised property to his son Samuel Harness and after his death to "his children." Samuel was the father of an illegitimate child who was the plaintiff and appellee in the case, and after the birth of plaintiff, testator's son, Samuel, married the plaintiff's mother, which under the statutes of Indiana rendered plaintiff legitimate and under prior decisions of the Indiana Supreme Court bastard children thus rendered legitimate were made so for all purposes. The mother and father of plaintiff were afterwards divorced and the latter married another woman by whom he had three children. The testator therein knew all the facts at the time he executed his will and of course he was presumed to know the laws of Indiana, including the statute referred to. He always referred to the plaintiff as his grandson and his son, Samuel, referred to plaintiff as his son. The court held under the circumstances that plaintiff was entitled to share in the will of his grandfather as being included within the terms of his will, since plaintiff had been made the legitimate child of his father through the latter's marriage with his mother. Clearly there was no departure in that case from the general rule, *supra*, that the word "children" in its primary meaning signifies

"legitimate children," since plaintiff had been made legitimate in the manner stated. The court, in the opinion admits that in arriving at its conclusion resort was had to the *language* of the will considered in the light of the circumstances. It says, "If, *upon a consideration of the whole instrument*, in the light of the circumstances preceding and attending its execution, it appears that the testator intended to include the child of illegitimate birth, such intention prevails and must be given effect." An examination of all the other cases referred to and relied on will show that some such controlling fact existed in each of them and the court was influenced by the fact that there was a "necessary implication" from the language of the will as interpreted by the extraneously proven circumstances to include *illegitimate children* in the devise to *children*.

In the instant case there is no ambiguity, repugnancy or uncertainty in the language of the testator. He uses the words "my children" without employing any other expression in the entire will to indicate that he meant to include any other persons than those primarily included within the usual and ordinarily accepted meaning of the term which, as we have seen, is legitimate children. It is true that if there were no persons to whom the term would apply in its usual and ordinary meaning (legitimate children) it would be competent to show that the testator meant illegitimate children, if there were any; but so long as there are individuals to whom the term can apply in its ordinary meaning, it will be conclusively presumed that only those persons are referred to, unless there is an implication to the contrary found somewhere in the will. To hold otherwise would open wide the door for extraneous proof, not only to enlarge a plain and usually understood term with reference to the designation of beneficiaries, but likewise enlarge equally plain and well understood terms designating the subject matter of the devise. And thus, the certainty of wills in these respects, as well as the intention of the testator with reference thereto, would be disturbed, frustrated, and in many cases perhaps entirely thwarted. Besides, such a rule as contended for in this case would inevitably result in much fraud, to say nothing of possible perjury. The established rules, *supra*, have been duly weighed and tried and have been found to effectuate justice much more than could be done were

they abandoned, although in some occasional cases (as is contended here) their application might produce harsh results. The same legal principle is involved where the contest is between "children" and "grandchildren, or stepchildren" or "adopted children," as will be seen from an examination of some of the cases, *supra*, and 40 Cyc. 1448-1455. This court in the cases of *Hughes v. Hughes*, 12 B. M. 115; *Churchill v. Churchill*, 2 Met. 466; *Shetts v. Grubbs*, 4 Met. 339, and *Hopson's Executor v. Commonwealth*, etc., 7 Bush 644, had before it the question whether the word *children*, used in a will to designate the devisees, embraced grandchildren so as to permit the latter to share in the division of the estate. There was nothing in either of the wills involved to indicate that the testator had employed the word "children" in any other than its ordinary and usual sense and the court denied the right of the grandchildren to participate in the division of the estate. In doing so the opinion in the *Hopson* case said: "Ordinarily there is no warrant for thus enlarging the term, and it will not be done except where the will would otherwise be inoperative (i. e. as where there were no children) or 'where the testator has shown by other words that he did not use the word in its ordinary and proper meaning, but in a more extended sense.' (*Churchill v. Churchill*, 2 Metcalfe, 496, and authorities cited; *Shetts v. Grubb's Ex'r*, 4 Metcalfe 341.) And none of the statutory provisions upon the subject of devises can be so construed as to abrogate or modify this well established rule of construction, nor has this court so held in any case." Later in the opinion it is said: "A careful scrutiny of the entire instrument satisfies us that the testator fully understood the ordinary popular meaning of the term used (nothing appearing in the will to the contrary) and that he intended by its use to convey the idea which would naturally and ordinarily be conveyed by the language chosen."

We see no escape from the conclusion reached by the trial court and its judgment is affirmed.

**Seiler, Safety Commissioner of the City of Covington,
et al. v. O'Maley.**

(Decided January 14, 1921.)

**Appeal from Kenton Circuit Court
(Criminal, Common Law and Equity Division).**

1. **Municipal Corporations—Quorum or Number Required to be Present to Act.**—A quorum of a representative body, with a definite membership, sufficient to authorize the transaction of business, in the absence of statutory provisions to the contrary, must consist of a majority of the membership of the body, which should include all of the members provided for whether they be filled or not; but it is competent for the legislature or that department of the state creating the board or body, to provide what shall constitute such a quorum, or to authorize the body itself to determine what shall constitute a quorum.
2. **Municipal Corporations—Quorum or Number Required to be Present to Act—Election of Health Officer.**—The statute (section 2054a-21, vol. 3, Kentucky Statutes) providing for a board of health in cities in this Commonwealth having more than ten thousand population, prescribes that the board shall consist of six members appointed by the council of the city, and that the mayor of the city shall be an ex-officio member thereof, and that the board as so constituted should elect a health officer for the city. Held, that the mayor as an ex-officio member of the board has all the power and authority of any other member and should be estimated in counting a quorum; and further, that for the purpose of electing a health officer for the city the board had a membership of seven (the health officer to be elected not to be estimated in counting a quorum although after his election he became an ex-officio member of the board) and that at a meeting where four members of the board, including the mayor, were present and elected a health officer his election was valid, since the four members present including the mayor constituted a quorum of the board for that purpose.

A. E. STRICKLETT for appellants.

F. J. HANLON for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The purpose of this suit, filed by appellee and plaintiff below, Dr. J. M. O'Maley, against the appellants and defendants below, city of Covington and certain of its officers, was to have himself declared the duly elected and qualified health officer of the city, and to compel defendants to recognize him as such officer and to pay to

him the salary fixed for such officer (which was \$1,250.00) at such times and in such amounts as the law directs. The relief sought is resisted by defendants upon the sole ground that at the meeting of the board of health for the city of Covington (which was on October 29, 1920) at which the plaintiff claims to have been elected health officer for the city there was not a quorum of that board present and that his pretended election was invalid, null and void. Upon final submission the circuit court adjudged plaintiff to have been duly elected health officer for the city and ordered and directed defendants to pay him his salary as provided by ordinance, and complaining of that judgment defendants prosecute this appeal.

The present statute creating the city board of health for a city of the population of Covington, and providing for the election by it of a city health officer is subsection (5) of section 1, chapter 65, page 290 of the Session Acts of 1918 and is section 2054a-21, vol. 3 Kentucky Statutes, 1918. It authorizes the city council of all cities of ten thousand inhabitants or more under certain circumstances, which it is admitted exists in this case, to appoint a board of health for the city to consist of six persons not members of the council, at least three of whom shall be competent physicians, and "The mayor of such city shall be ex-officio a member of such board of health." It is made the duty of the board of health as thus constituted to elect a competent physician as city health officer, and it is provided that such health officer after his election shall also be an ex-officio member of the board. In the meeting at which plaintiff claims to have been elected there were present three of the six appointed members and the mayor, who by the statute was an ex-officio member of the board. Defendants contend (a) that the mayor, being only an ex-officio member, can not be counted in estimating a quorum of the board and that without him there were only three of the six appointed members present, which number did not constitute a quorum. If mistaken in this they then contend (b) that if the mayor as an ex-officio member of the board may be counted in estimating a quorum for the purpose of transacting business, then the health officer provided by the act, who when elected is likewise an ex-officio member of the board, should also be counted in estimating a quorum, which if done would make the en-

tire membership of the board consist of eight members and that the four present at the meeting when plaintiff was elected did not constitute a quorum. On the other hand plaintiff insists that the mayor as ex-officio member of the board is a member thereof for all purposes, including the creation of a quorum, as much so as is any of the appointed members of the board, and that until the election of a health officer the board consists of only seven members, four of whom would constitute a quorum for the transaction of business and that at the meeting in question, there being the latter number present, he was duly elected.

The common law rule as to what constitutes a quorum of a representative body consisting of a definite number of members is that a majority of the authorized membership shall constitute a quorum for the purpose of transacting business, but it is everywhere held and recognized that it is competent for the statute, or the Constitution, creating the particular body to prescribe the number of members that shall be necessary to constitute a quorum, or it may delegate to the created body the authority to so prescribe. 28 Cyc. 330-331; 19 R. C. L. 888; Dillon on Municipal Corporations, fifth edition, vol. 2, section 513; Morrill v. Little Falls Manufacturing Co., 21 L. R. A. 174, and annotations; Barry v. Town of New Haven, 162 Ky. 60; McQuillin on Municipal Corporations, vol. 2, section 594; City of Somerset v. Smith, 105 Ky. 678, and Pinson v. Morrow, Governor, 189 Ky. 291.

We find no statutory provision prescribing the number necessary to constitute a quorum of the board of health of the city of Covington. In the act, *supra*, creating the board there are other provisions relative to county and district boards of health (subsections 10 and 15 of section 2054a) and there are provisions with reference to what shall constitute a quorum of county and district health boards. In subsection 21 of that section (being the one creating the health board now under consideration) it is said: "Such local board shall have the same powers within its respective cities as local boards for counties are invested with by this chapter." This quoted sentence, however, refers only to the *powers* of the local board for cities of the population prescribed, and not to the *procedure* of such boards. We do not therefore think that we are authorized to read into the statute creating the local city boards the quoted pro-

vision prescribing what should constitute a quorum in county boards. If, however, we were authorized to do so, appellants would not profit thereby for in the subsection providing a quorum for the county board of health it is said, "A majority of the qualified members constituting a quorum with the full authority of the board," &c. Applying that provision it is quite evident that in this case the health officer, before his election, could not be considered as a member of the board for the purpose of estimating a quorum, since at the time of the election he was not an officer and was not therefore a *qualified* member of the board. No incumbent could vote at a meeting to elect his own successor (if a valid election could be held in the absence of a vacancy) when he was a candidate for re-election, since for manifest reasons he would be disqualified to vote. *Chilton v. Bell County Coke and Improvement Co.*, 153 Ky. 775, and *Coles v. Williamsburgh*, 10 Wend. 659.

Looking at the wording of the statute creating the board of health for the city of Covington and providing for the election of a health officer, in the light of reason and common sense, we unhesitatingly conclude that the board for the purpose of electing a health officer of the city consists of the number of members provided by the statute independent and exclusive of the health officer. If the mayor of the city of Covington by virtue of his office is to be considered a member of the board for all purposes its membership would then and for that purpose consist of seven, but if he is not to be treated as a member of the board or counted for the purpose of making a quorum the membership of the board would then be six and a quorum would be four of the six appointed members. Whatever may be the power and authority of the health officer of such local boards after his election as a member thereof by virtue of his office, we are satisfied it was never the intention of the legislature to require his ex-officio membership to be taken into consideration in the estimation of a quorum of the board for the purpose of filling the place. Until the health officer is elected there could not be in any event exceeding seven members of the board and in no instance imaginable could the health officer as an ex-officio member of the board participate in the election of himself or in which he was a candidate. As we have seen there would be no necessity for an election if that office was already filled

and so the question turns on whether the mayor of the city of Covington, who by statute was made an *ex-officio* member of its board of health, was a member of that board for all purposes and especially for the purpose of estimating a quorum. If he was, four members would constitute a quorum and the election of plaintiff was valid as the trial court held.

In the case of *Kent County Agricultural Society v. Houseman*, 81 Mich. 609, the articles of association of the Agricultural Society provided that its board of management should consist of five directors, a president, a secretary and a treasurer, the last three of whom were made directors by virtue of their respective offices. A sale of the Society's property was questioned because at the meeting of the board of management at which it was authorized it was necessary to count some of the officers (*ex-officio* members) in order to constitute a quorum of the board. The court held that the *ex-officio* members were such for all purposes and had the right to vote on all matters coming before the board. The opinion says, "These officers are *ex-officio* directors and entitled to vote on all matters the same as those who are specially called 'directors.' We think that the proposition to sell was carried by the proper vote."

A contrary view was held in the early case of *Miller v. Chance*, 3 Edw. Ch. (N. Y.) 399. But, in that case the opinion was largely based upon the construction which the court gave to the statute making the officers *ex-officio* directors, the court being of the opinion that the statute as worded excluded the participation of the *ex-officio* directors in the character of action involved. Mr. Thompson in his excellent work on Corporations, vol. 2, section 1160, mentions and discusses both the Michigan and New York cases above referred to and condemns the doctrine of the New York case, saying: "Aside from that (the construction which the court gave the statute) the soundness of the conclusion of the (N. Y.) court may well be doubted. The law that grants the charter, or the charter that gives life to the corporation, can certainly create trustees or directors *ex-officio*; and when thus created they necessarily possess the powers and rights of other trustees, and are hence qualified to make up a majority or a quorum which alone can bind the corporation in extraordinary matters."

Independent of that eminent authority, we can see no logical reason, nor has one been presented to us, why an ex-officio member of a representative body should not have, in cases where he is not personally interested, all of the authority of other members. In the one case his power and authority as such member is conferred upon him by that department of the sovereignty having authority to create the board because of the fact of his holding some office, while the other members receive their power and authority because of their election or appointment in the manner provided by the same governmental department. We have no doubt but that it would be competent in the creation of the board to provide that it should be composed entirely of ex-officio members, and because some of the members are selected in the manner pointed out in the law creating the board, while others are selected by the terms of the law itself, whether it be a statutory or constitutional provision, can not possibly affect the extent of the power and authority of the members. They are each vested with full power and authority to do any and all things necessary and essential to carry out the purpose of the law in creating the board or body, whether they be ex-officio members or selected in the manner provided by law. If, as contended by appellants, an ex-officio member can not be counted in forming a quorum we fail to see any additional reason why such a member should have the right to vote or should have his vote counted in the transaction of any other business of the body. To our minds the rule contended for, pursued to its only logical conclusion, would result in depriving the ex-officio member of all voice in the proceedings of all meetings and render his position on the board void of all effect except perhaps to entitle him to be present at the meeting. Such an absurd consequence was never contemplated. On the contrary, when one is made by the proper authority an ex-officio member of a created body or board it is to be presumed that those responsible for its creation had some purpose in view in designating the ex-officio member. Manifestly, that purpose was to constitute that individual a member of the board or body because of his holding some office of trust, and that whoever held that office should perform, in addition to his official duties, also those incumbent upon the board of which he was made an ex-officio member.

Our conclusion, therefore, is that the health board of the city of Covington at the time plaintiff was elected consisted of only seven members, of which the mayor was one, and that he and the three others who attended the meeting resulting in plaintiff's election constituted a quorum of the board and that plaintiff was legally elected health officer for the city of Covington. The judgment having so held it is affirmed.

Frazier v. Commonwealth.

(Decided January 14, 1921.)

Appeal from Daviess Circuit Court.

Criminal Law — Accomplices — Corroboration.—In determining whether under the provisions of section 241 of the Criminal Code there has been sufficient corroboration of the testimony of an accomplice, the rule is that if when the evidence of the accomplice is eliminated there yet remains other evidence connecting the accused with the commission of the crime, it is sufficient.

RICHARD H. SLACK and TANNER W. JETT for appellant.

CHAS. I. DAWSON, Attorney General, and **CHAS. W. LOGAN**, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

The appellant, Coy Mason, James Barker and Chester Clements were jointly indicted, charged with breaking into the storeroom or warehouse of the Owensboro Street Railway Company with the intention to steal therefrom articles of value. The indictment charged each of them as principal and each of them as an aider and abettor of the others.

The appellant was granted a separate trial, and upon such trial was found guilty and sentenced to the penitentiary for three years.

This appeal is prosecuted solely upon the ground that the only evidence of his guilt was that of two of his accomplices, Mason and Barker, and that in as much as section 241 of the Criminal Code provides that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the of-

fense, the lower court erred to his prejudice in not sustaining his motion for a directed verdict of not guilty at the close of the Commonwealth's testimony.

Mason and Barker, the two accomplices, testified, in substance, that they had previously arranged with appellant and Clement to break into the warehouse or office of the street railway company; and that in accordance with this arrangement they met at twelve o'clock at night at a certain point in Owensboro and from there the four proceeded to the warehouse or office; and that there was found a transom to one of the outside doors open and Mason, with the assistance of Barker, was elevated to and went through the transom, while Frazier was a few feet away standing guard; and that Mason after getting on the inside opened a window and Barker also went in through the window; that after getting in this outer room they removed the screws from a screen between that and the inside office whereby the screen was lifted or raised and they went into the inside office, and there, in some manner not clearly disclosed, opened the safe and took therefrom something over two hundred dollars in money and a large number of metal checks used by the railway company to sell to its patrons for use in riding on its cars; and that they took this money and these checks to a point nearby and the four of them divided the money equally but that Frazier took most of the metal checks.

The only evidence tending to connect appellant with the commission of this crime other than that of the two accomplices was that of two women, Zulu Rush and Anna Zink. Mrs. Rush states that a short time after the warehouse and office were broken into, not definitely fixing how long, the appellant was at her home, and while in the same room with her exhibited a considerable number of metal checks, appearing to her to be such metal checks as were used by the Owensboro Railway Company, and that he had something like a double handful, or when his hands were cupped together it looked as if they were almost full of these checks. While she was on the stand there was exhibited to her one of these checks which was offered in evidence, and she said that was the kind of checks she had seen Frazier have.

Anna Zink states that after the robbery she saw appellant on the street one day with "a lot of checks in

his hand," meaning these metal checks, but not giving the number.

The sole question here is, does the evidence of these two women sufficiently corroborate the evidence of the two accomplices to satisfy the provisions of section 241 of the Criminal Code, where it is provided, "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof."

In determining this question the rule has been laid down by this court that if, eliminating the evidence of the accomplice, or accomplices, there yet remains other evidence which will connect the accused with the commission of the crime, it is sufficient under the terms of that section: *Hale v. Com.*, 185 Ky. 119; *Com. v. McGarvey*, 158 Ky. 570.

From the evidence of these two women we find this appellant, a short time after the commission of this crime, when a large number of these checks were stolen, in possession of a most unusual number of them, and there is no explanation of such possession.

Applying the rule laid down in the cases referred to, it is apparent that this significant evidence tends to connect him with the commission of this crime.

Judgment affirmed.

Craig v. Commonwealth.

(Decided January 14, 1921.)

Appeal from Jefferson Circuit Court
(Criminal Division).

Incest—Relationship and Knowledge—Evidence.—A charge of incest against a father, committed with his daughter, may be upheld and a conviction sustained upon the evidence of the daughter alone, she not being an accomplice; but in this case there were corroborating circumstances. (*Whittaker v. Com.*, 95 Ky. 632.)

CLEM W. HUGGINS for appellant.

CHAS. I. DAWSON, Attorney General, THOS. B. MCGREGOR, Assistant Attorney General, and JOSEPH M. HUFFAKER, Commonwealth's Attorney, for appellee

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

The appellant was indicted, tried and convicted of incest under section 1219, Kentucky Statutes.

He prosecutes this appeal solely upon the ground that the evidence was of a flimsy and uncertain character and did not, therefore, authorize the conviction, and because such evidence was procured from the chief prosecuting witness by leading questions, and by a process of sweating or questioning while under arrest both by police officers of the city of Louisville and federal officials.

As to the sweating charge, it is sufficient to say that there is no evidence to sustain it, the prosecuting witness stating that her statements to the officials were voluntarily made.

As to the leading questions, her main examination wherein she gave positive and direct evidence against her father discloses that not only were the questions propounded free from any objectionable leading, but in so far as this direct evidence was concerned no objection was made to them.

The claim that the testimony was of flimsy and uncertain character involves a short statement of that evidence, and it is as follows, to-wit: that the appellant was in his forty-second year and the prosecuting witness little short of seventeen; that he had been married and had lived in or near Pittsburg until about six years before the trial, at which time his wife died and left him with this one child, a daughter, who is the prosecuting witness; that since then he had lived at numerous places and was engaged in the occupation of cook or chef; that his daughter had lived at stated times with her two aunts, his sisters, at Wheeling, W. Va., and Indianapolis, Ind., and had for some three years of the six lived with her aunt, her mother's sister, at East Liverpool, Ohio; that the daughter was unruly and could not get along with her aunts, or some of them, and about September, 1919, he and the daughter came to Louisville to live; that he first rented a room wherein there were two beds, and the daughter was supposed to occupy one and he the other, but that subsequently they moved to another room wherein there was only one bed, and at which lat-

ter place he was arrested, the two at the time being in bed together.

The daughter in her evidence says that while they were occupying the room wherein there were two beds he commanded her one night to come to his bed and that she did so under protest, and that he then and there had intercourse with her, but only once since they had been in Louisville.

A woman physician testifies that she had examined the girl and that her hymen had been completely ruptured in such manner as to indicate that she had had intercourse with a man.

The father testifies denying specifically that he had ever had intercourse with the girl and explaining that he occupied the same room with her for two reasons; first, because he was unable because of his poverty to engage or pay for more than one room; and, second, because he was apprehensive as to the girl's conduct and desired to be as near to her as possible so that he might overlook and carefully watch her.

With the positive statement of the girl, the fact that they were found in bed together by the officers, and the additional fact that her hymen had been completely ruptured, it would seem to be a waste of words to discuss the question whether the jury, if believing the Commonwealth's evidence, were not fully authorized to find a verdict of guilty.

It has been held in this state that a conviction for incest may be had against a father upon the testimony of the daughter alone, she not being an accomplice: *Whittaker v. Com.*, 95 Ky. 632. In this case there was not only the direct statement of the daughter but the corroborating circumstances above referred to.

Judgment affirmed.

Saylor v. Hilton.

(Decided January 14, 1921.)

Appeal from Garrard Circuit Court.

Receivers—Title to and Possession of Property—Waste.—In an action, wherein the title to land is involved, a receiver should not be appointed for the land, when it is not shown, that the party

applying for the receiver, is not in the enjoyment of all the land and all the rights which he claims in it; and if a party to the action is shown to be in possession and claiming the ownership of it, a receiver should not be appointed, unless, it appears, that the party in possession is insolvent and committing waste thereon; and if the land is jointly owned, a receiver should not be appointed unless the one in possession is committing waste, or excluding the other joint owners, or at least doing something in derogation of the rights of the others interested, and there is no other available remedy to protect the rights of all.

L. L. WALKER and R. H. TOMLINSON for appellants.

J. E. ROBINSON for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.

J. I. Hilton was the owner of a tract of land, containing about one hundred and eighty acres in Garrard county, when he died, the appellee, Nancy Hilton, his widow, surviving him. He left no children surviving him, but he left surviving him certain brothers and sisters, and had other brothers and sisters who were dead, and who left children surviving them. The appellant, Granville Saylor, became the owner, by purchase, of the interests of several of these collateral heirs in the tract of land. He claims by his pleadings to be the owner of $\frac{23}{24}$ of the entire tract of land, and $\frac{1}{48}$ of the remainder of the land subject to the dower right of Nancy Hilton. She claims by her pleadings to be the owner of an undivided one-half of the land in fee, and dower in the other undivided one-half, and that she is entitled to the occupancy and use of the mansion and curtilage, until the assignment of dower to her. Certain of the heirs of J. I. Hilton, or rather their assigns, have intervened in the action, and asserted title to certain interests in the property. While the action was in this condition, upon motion of the appellee, Nancy Hilton, the court entered an order directing its master commissioner to take custody and possession of the property as a receiver and requiring the claimants to deliver the possession to him, and directing him to let the property to rent for the year 1920. To this order the appellant objected, and his objection being overruled, excepted. He has appealed from the order to this court.

Section 298 of the Civil Code provides as follows:

“On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him”

It is admitted by the appellant that the appellee has a dower in an undivided one-half of the land, but he denies that she has any other interests in it. She claims the ownership of one-half of the land in fee, and a right of dower in the other undivided one-half. Hence, there could be no doubt of her having an interest in the land, the right to which is involved in the action, and probably has a right to more of the land than is admitted by the appellant. It is, also, apparent that the appellant is the owner in fee of nearly one half of the land, and probably is the owner of all of it subject to the appellee's right of dower. The record is entirely silent as to the present occupancy and possession of the land. There is nothing in the record to indicate, but, what the appellee is in the occupancy and enjoyment of all the land which she claims and of all the interests in the land to which she claims a right, and there is nothing to indicate that she is being excluded from the occupation or use of the land in any way by the appellant, or any other claimant of it. There is nothing to indicate that the land will suffer any material injury by the failure to appoint a receiver, nor that the appellee will in any way be deprived of the rents or use of the land pending the litigation. Under such circumstances it would be manifestly improper to appoint a receiver at the cost of the claimants to the land, to manage and conduct the business of the appellee; and if she is already enjoying all the rights to the property to which she is entitled, it would be a harsh remedy to take the possession of the remainder of the property from the appellant, who claims to be the owner of it. It does not appear that the appellant, or any other claimant, who may have the possession of the land, or any part of it, is insolvent, or is committing any waste upon the land or injury to it. The cases in which receivers ordinarily will be appointed are confined to those in

which it can be established to the satisfaction of a court, that the appointment of a receiver is necessary to save the property from injury or threatened loss, or destruction, or that the claimants in possession are excluding another party from rights which the latter has in the land, and the mere fact that the placing of property in the hands of a receiver will do no harm, is not sufficient to authorize such action by the court. The general rule adhered to in this jurisdiction is that where the title to land is involved, or there is a proceeding to enforce a lien, and the party who is in possession and claiming title is insolvent, and committing waste, or if the party suing to enforce the lien can show that he is entitled to the rents, under his contract, and the property is insufficient to pay his claim, and the one in possession is insolvent, a receiver will be appointed. *Collins v. Richart*, 14 Bush 621; *Hounshell v. Insurance Company*, 81 Ky. 304; 23 R. C. L. 18, 19. Where there is a controversy involving the right to lands which are jointly held, between the joint owners, as between tenants in common, and persons, the owners of undivided interests, the courts refuse a receiver, when there is nothing to show that the adverse party is in exclusive possession and denying to those asking a receiver, a participation in the enjoyment of the property, or else that those in possession are insolvent and are managing the property in such a way as to materially injure it.

In the instant matter there is nothing to indicate the property in controversy was in danger of material injury, or that any one of the claimants was excluding the appellee from participation in its rents, profits or use; or that the appellant or any other claimant was in possession of it or was insolvent, or was guilty of any misconduct which affected the rights of the appellee, or, further, that the appellee was not enjoying in the property all the rights which she claimed in it. Therefore there was no ground presented or shown for the appointment of a receiver for the land, and the order appointing the receiver is therefore reversed and cause remanded for proceedings not inconsistent with this opinion.

Riley v. Commonwealth.

(Decided January 14, 1921.)

Appeal from Perry Circuit Court.

1. **Rape—Time of Commission of Offense—Evidence.**—In the trial of an indictment under section 1155, Kentucky Statutes, the Commonwealth may prove the offense was committed any time prior to the finding of the indictment.
2. **Jury—Member of Grand Jury Which Returned Indictment.**—That a juror selected to try one charged with a felony was a member of the grand jury which returned the indictment does not render his discharge a matter of necessity. It only raises a question of implied bias which accused may challenge or waive.
3. **Jury—Discharge of Juror—Waiver.**—Where a jury is discharged from service with accused's concurrence, his consent thereto is an implied waiver of any objection to being tried anew.
4. **Jury—Discharge of Juror—Implication of Consent.**—Consent to the discharge of a juror may appear as well by implication from the circumstances as by express words.

C. W. NAPIER and S. S. COMBS for appellant.

CHAS. I. DAWSON, Attorney General, THOS. B. MCGREGOR, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

This is an appeal from a judgment finding appellant guilty of the offense condemned by Kentucky Statutes, section 1155. His punishment was fixed at ten years confinement in the penitentiary.

It is insisted the indictment is bad in that it does not state when the alleged offense was committed.

We find no merit in this contention. In the indictment which was returned October 8, 1919, it is charged the crime was committed on or before the seventh day of October, 1919, and at a time when the prosecuting witness was under the age of sixteen years. Criminal Code, section 129, provides:

“The statement in the indictment as to the time at which the offense was committed, is not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense.”

The indictment is sufficient. Time is not material if the female was under sixteen years of age when the offense was committed and the Commonwealth may prove

the commission of the offense at any time prior to the finding of the indictment. It was so held in *McCreary v. Commonwealth*, 158 Ky. 612, 165 S. W. 981, where the court sustained an indictment under the same statute which charged the crime was committed on the — day of —, 1912. The evidence in that case proved it was committed in 1909 or 1910.

When the present case was called for trial, both parties announced ready, a jury was selected and accepted by the Commonwealth and accused, the latter waived arraignment and entered a plea of not guilty, the jury was sworn and the indictment read to the jury. After the case had been stated by the Commonwealth's attorney and counsel for appellant, French Evans, a juror, announced from the jury box that he was a member of the grand jury that returned the indictment against Riley under which he was about to be tried. The court then consulted both sides as to the proper procedure under the circumstances.

After consulting with his client, the attorney for appellant told the court to take whatever course he thought proper. The court thereupon, without objection, discharged said juror, another was called, accepted and the trial proceeded. Appellant reserved an exception to the order discharging Evans; he entered a plea of not guilty, after the new juror had been accepted and he likewise entered a plea of former jeopardy. The sufficiency of this latter plea is the question for our decision.

No person shall, for the same offense, be twice put in jeopardy of his life or limb, Ky. Const., sec. 13.

In *Cooley's Const. Lim.*, p. 467, it is said:

"A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impanelled and sworn."

Particular causes of challenge to a juror are either actual or implied bias. Criminal Code, section 208.

Service on the grand jury which found the indictment does not render the discharge of the juror a necessity, it merely raises a question of implied bias, which accused may challenge or waive. Criminal Code, section 210. By objecting to the trial proceeding with a juror

in the panel who has served on the grand jury finding the indictment, accused renders a discharge of the jury necessary and when so discharged, he cannot thereafter rely upon the plea.

In *O'Brian v. Commonwealth*, 9 Bush 333, where a similar situation arose, the court, *sua sponte* and over the objection of accused, discharged the juror and had another summoned in his stead.

It was held there was no legal reason or necessity for discharging the juror, that having been accepted by both parties, nothing but the death, sickness or some accident preventing the juror's continuing on duty authorized the court without the consent of accused to say he should no longer constitute one of the panel.

To authorize the discharge of a duly empanelled jury before verdict, a manifest necessity therefor must exist and a plea of former jeopardy will not avail where such necessity exists. However, the discharge of a jury for a reason legally insufficient without accused's consent and without an absolute necessity for it, is equivalent to an acquittal and may be pleaded as a bar to subsequent proceedings. 16 C. J. 250. If a jury is discharged during trial with the prisoner's concurrence, his consent thereto is an implied waiver of any objection to being tried anew and he may be so tried. So his consent to the discharge may appear as well by implication from the circumstances as by express words. *Robinson v. Commonwealth*, 88 Ky. 386; *Bishop's New Crim. Law*, vol. 1, sec. 998.

Had accused remained silent a different question would be presented, but this he did not do. The trial judge was anxious to proceed properly in the matter and so informed counsel. Appellant did not object to the discharge of the jury as was done in the *O'Brian* case, *supra*, and while he did not expressly consent to the discharge of the juror yet his counsel's statement to the court after consulting with his client, "for the court to take whatever course he thought was proper," was clearly indicative of an implied consent to the action taken by the court.

Under the circumstances his exception to the court's ruling in discharging Evans from further service in the case, will not avail him now.

There is nothing to indicate an expression of a preference on the part of appellant to have the juror Evans

remain in the panel as argued in the brief; indeed the record shows to the contrary.

Finding no error in the judgment appealed from, same is accordingly affirmed.

Breeding v. Commonwealth.

(Decided January 14, 1921.)

Appeal from Letcher Circuit Court.

1. **Criminal Law—Arraignment Upon Charge of Incest—New Indictment for Detention of Female Against Her Will.**—A person who is indicted for incest and who is prepared on the day of trial to defend that charge cannot over his objection be forced into trial under an indictment returned on that day charging him with the offense of detaining a woman against her will. A statement in the second indictment that it was in lieu of and a continuation of the charges in the former indictment will not avail the prosecution.
2. **Rape—Detaining Woman Against Her Will—Not Degree of Incest.**—The offense of detaining a woman against her will is not a degree of the offense of incest.

D. D. FIELDS & DAY for appellant.

CHAS. I. DAWSON, Attorney General, and CHAS. W. LOGAN for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

Appellant was indicted by a Letcher county grand jury August 16, 1918, for the crime of incest and was admitted to bail in the sum of \$3,000.00. The case was continued on the docket from time to time until April 16, 1920, on which date another indictment was returned against appellant charging him with the offense of detaining a woman against her will. It is recited in the last indictment that it is in lieu of the one found in August, 1918, and is a continuation of the charge contained in the earlier indictment.

When the second indictment was returned, appellant was in court with his witnesses prepared to try the case under the first indictment, and it was sought forthwith to compel him to enter into a trial of the charges that day preferred against him.

He filed an affidavit seeking a continuance of the trial on several grounds, among others that he was not prepared for trial as he had no intimation of any such charges being filed against him; that the finding of the indictment was the result of a conspiracy on the part of his children to get rid of him, and if granted time to secure witnesses he could disprove said charges. It is admitted appellant was forced into a trial under the second indictment on the day it was filed.

The Commonwealth's attorney was not required to admit the truth of the statements in the affidavit for continuance, but was allowed to contradict the statements in said affidavit and to cross-examine appellant in regard to same. In permitting this procedure the court was evidently under the impression that the act of March 22, 1920, amending section 189 of the Criminal Code was in effect, but that act did not become a law until ninety days after the adjournment of the general assembly. (Ky. Const., sec. 55.) Subsection 2 of said section 189, repealed by the act of 1920, but in force when the trial was had, provides that subsection 1 (re-enacted by the 1920 act), should not apply to a motion for a continuance made at the same term at which the indictment was found.

In this subsection 1, it is provided the Commonwealth is not compelled to admit the truth of the matter contained in an affidavit for a continuance as to what absent witnesses would prove but only that said witnesses would testify as alleged in the affidavit. The Commonwealth is also given the right to controvert the statements of such affidavit and to impeach the absent witnesses the same as if personally present.

Appellant was found guilty and sentenced to a term of four years in the penitentiary. His motion for a new trial having been overruled he has prosecuted this appeal.

The Commonwealth very frankly and properly admits appellant has not had a fair trial.

In section 185 of the Criminal Code it is provided:

"If the defendant be in custody, or on bail when the indictment is found, *or be summoned or arrested three days before the time fixed for the trial*, the trial may take place at the same term of the court, at a time to be fixed by the court."

The italicized words were added by an act of 1910. On April 16, 1920, appellant was not in custody nor on bail for the offense for which he was indicted on that date, nor had he been summoned or arrested on that charge three days before the trial. Unquestionably appellant was entitled to some time within which to prepare his defense and secure his witnesses, and time should have been granted him for this purpose under the circumstances.

As said in *O'Brian v. Commonwealth*, 9 Bush 333:

"The Commonwealth is not in pursuit of victims, but desires to inflict punishment only in a legal and constitutional way upon the guilty."

In *Brooks v. Commonwealth*, 100 Ky. 194, 37 S. W. 1043, decided in 1896, accused was indicted on the second day of the June term of court for a homicide committed the evening before and his trial set for the fourth day of the term. His motion for a continuance was overruled and this was held error though the facts set forth in the affidavit for a continuance were not technically legal grounds for a continuance.

By no sort of reasoning could the charges or trial under the new indictment be treated as a continuance of those contained in the first one. The prosecutions were under entirely different statutes. For incest the punishment is from two to twenty-one years (Ky. Stats., sec. 1219), for detaining a woman against her will, the punishment is from two to seven years. (Ky. Stats., sec. 1158.)

Neither is a degree of the other nor could a person indicted under one be convicted under the other. To allow this the two offenses must be in substance precisely the same or of the same nature. 16 C. J. 264.

Sections 262 and 263 of the Criminal Code provide that upon an indictment for an offense consisting of different degrees, defendant may be found guilty of any degree not higher than that charged, or of any offense included in that charged. Under an indictment for robbery a conviction may be had for a simple larceny, *Commonwealth v. Prewitt*, 82 Ky. 240, and in *Commonwealth v. Hurd*, 109 Ky. 8, 58 S. W. 369, housebreaking was held to be a degree of burglary. Likewise under an indictment for murder accused may be convicted of malicious cutting and wounding. *Housman v. Commonwealth*, 128 Ky. 818, 110 S. W. 236. Carnally knowing a female

under the age of consent is a degree of the offense of rape. *Eades v. Commonwealth*, 162 Ky. 89, 172 S. W. 104, but the offense of detaining a woman against her will is not a degree of the crime of rape. *Head v. Commonwealth*, 174 Ky. 841, 192 S. W. 861.

It follows therefore that the offense denounced by Kentucky Statutes, section 1158, to-wit, detaining a woman against her will is not a degree of the offense with which appellant had been charged in the first indictment, namely, incest. (Ky. Stats., sec. 1219.)

For these reasons the judgment appealed from will be reversed for further proceedings consistent herewith.

Daniel v. Daniel.

(Decided January 14, 1921.)

Appeal from Campbell Circuit Court.

Fraud—Actionable Fraud—Want of Consideration.—A promise unsupported by a consideration and to be performed in the future made by a son to his aged father held to be actionable fraud where it was fraudulently made by the son to defeat his father's right to redeem his land purchased by the son at execution sale for less than one-third of its value, and was relied upon by the father until his statutory right of redemption had expired.

R. G. WILLIAMS and BARBOUR & BASSMAN for appellant.

C. T. BAKER for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

Appellant, who is the father of appellee, owned a small tract of land in Campbell county, which was regularly sold by the sheriff under an execution issued upon a judgment against him in favor of a third party. At that sale the land was appraised at \$360.00 and appellee became the purchaser for \$113.10 which he paid. By section 1684, Kentucky Statutes, the owner may redeem land sold under execution for less than two-thirds of its appraised value by paying within a year after the sale the purchase price with 10% interest, to the purchaser, or to the county clerk if the purchaser refuses to accept same or is a non-resident. When the right of redemption

exists the purchaser can not procure a deed to the land until after the expiration of that right. Appellant did not redeem within the year and appellee procured a deed from the sheriff at the expiration of the year.

Thereafter appellant instituted this action in equity to require appellee to accept the purchase money with 10% for one year and 6% thereafter, which was tendered with the petition, and to reconvey the land to him. A demurrer was sustained to the petition and same dismissed, from which judgment this appeal is prosecuted.

Plaintiff admits in his petition that he was aware of his right to redeem the land within a year by paying to defendant the purchase price with 10% interest, but alleges that he was under the impression the payment had to be made at the court house in Alexandria, which was a long distance from where he and defendant resided; that he is about 76 years of age and has no horse or conveyance; that some weeks before the expiration of his redemption right he went to defendant and informed him that he had the money, desired to redeem his land and that he would get a horse from a neighbor and they would go to Alexandria for the purpose; that defendant knowing of his erroneous impression that the payment had to be made at the court house agreed to take him there to redeem the land, without any intention of doing so but for the fraudulent purpose of defeating his right to redeem; that he relied upon this promise held out to him by his son "during and up to the last day" for redemption; and that he did not discover until too late to make other arrangements for the trip within the redemption period that the son would not carry out his promise and had never intended to do so.

If these allegations are true, and they must be so considered upon the demurrer, the son has acquired an unconscionable advantage of his aged father by taking advantage of the latter's ignorance of the law and trust in him. The son will have lost nothing, in fact will have received a rate of interest, otherwise excessive and usurious, on his money for a part of the time he has been out its use, if the father is granted the relief he asks, whereas if this relief is denied him the father loses his land and the son gets it for less than one-third of its value. No right of any third party is involved.

Must equity stand impotent under such circumstances? The just and equitable course for both parties

to pursue is at once apparent to the judicial conscience, and surely it can not be true, as counsel for defendant would have us believe, that judicial logic and rules of procedure block the way out of the predicament in which this ignorant and trustful old father finds himself.

No case of course is cited where the facts are even remotely analogous to support defendant's contention, but general rules of equity are relied upon, which being general are applicable to ordinary cases and by their very nature are inapplicable where the conditions are unusual and extreme as here.

The first of these general rules relied upon is that equity aids only the vigilant, and its application here is asked because plaintiff did not exercise diligence in ascertaining the law, which any way he is presumed to have known, and in making tender to defendant as he should have done; and in not demanding at least of defendant that he carry out his promise before it was too late to make other arrangements for going to Alexandria where necessarily he would have learned of his mistaken impression about the law in time to have paid the money to plaintiff before his right of redemption expired.

Even if such diligence would have been required of a stranger this argument is without force here since it wholly ignores the confidential relationship of father and son, and the consequent duties of one to the other, which affect materially the relative term diligence. Diligence as defined by Bouvier is: "The degree of care and attention which the law exacts from a person in a particular situation or given relation to another." Is then a father to be held wanting in diligence when he confidently relies upon the promise of his son? Certainly not upon demand of the son that he may thereby have an unconscionable advantage of the father. It is, we apprehend, as much the delight of equity in a proper case to aid one disarmed of vigilance by reason of a confidential relationship, as to aid the vigilant in other relationships.

It is next urged that the promise was unenforceable because unsupported by a consideration, and therefore not actionable even if fraudulently made. It is true that as a general rule fraud can not be predicated upon the failure to perform a promise or contract which is unenforceable, but as said in 12 R. C. L. 238, "there is au-

thority for the relaxation of this rule in cases of great hardship," and we have a case of such great hardship here as hardly requires the citation of such authority although we shall do so later as it also covers the next contention of counsel.

Our attention is next called to the fact that the promise was to be performed in the future and such promises ordinarily are held not to be actionable although fraudulent, upon the ground that a mere promise to perform an act in the future is not in a legal sense a representation. But after stating this general rule, in setting out the many exceptions to and modifications of same we find at the head of the list in 12 R. C. L. 257, that "Fraud may be predicated on the non-performance of a promise in certain cases where the promise is the device to accomplish the fraud or where a relation of trust and confidence exists between the parties. So if through inducements held out by one person, even if by means of a promise alone, another is influenced to change his position so that he cannot be placed in *statu quo*, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud."

The case at bar presents every one of these exceptional elements of actionable fraud.

As said in *Fairy v. Kennedy*, 68 S. C. 250, 47 S. E. 138, and approved in *Kinkaid v. Rossa*, 31 S. Dak. 559, Ann. Cas. 1915 D, 1098: "The owners of the property were lulled into allowing the property to be bought for much less than its value by the promise or representation of the purchasers that they should have a chance to redeem it. To have their bargain the purchasers must carry out the promise or representation which they made and it is of no consequence that the promise or representation did not amount to a legal contract. Having escaped from the contract under the statute of frauds and because the promise was not sufficiently definite for legal enforcement they cannot hold the bargain obtained by the promise for that would be fraud." In neither of these actions in which relief was granted to the owner of land from an otherwise legal sale under execution because of an unconscionable advantage obtained by a promise on the part of the purchaser to do an act in the future, was the promise such as could have been enforced. In both cases it was held to be immaterial that the promise was void and unenforceable, and that the ma-

terial facts were that the plaintiff was lulled into a sense of security by and relied upon the promise and that the violation of the promise by the defendant gave him an unconscionable advantage. We have all of these considerations appealing to our conscience here and in addition the confidential relationship of an aged father and his son with its urgent appeal for absolutely fair dealing.

If the son knew the payment did not have to be made at Alexandria, as he as well as the father is presumed to have known, fair dealing at least between father and son required him to correct his father's false impression of the law and not to take advantage of his father's apparent ignorance by promising to carry him to Alexandria to redeem his land. If the son too was ignorant of the law, having promised to provide the conveyance and accompany his father to Alexandria within the redemption period to redeem his land, fair dealing requires of him that he shall not take advantage of the consequences of his violated and fraudulent promise, which are highly beneficial to him but equally detrimental to his aged father; and justice and good conscience and therefore equity, demand of him that he yet permit his father to redeem his land.

We are therefore of the opinion the chancellor erred in sustaining a demurrer to the petition and in dismissing same.

Wherefore the judgment is reversed with directions for further proceedings consistent herewith.

Louisville & Nashville Railroad Company v. City of Louisville.

(Decided January 18, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Second Division).

1. Eminent Domain—Street Extension—Necessity—Public Use.—The necessity for extending or opening streets, as well as the necessity for condemning rights of way, is a matter which has been confided to the decision of the municipal authorities, and their judgment is conclusive upon the courts unless it be made to appear that the use was palpably private, or the necessity for the taking was without any reasonable foundation.

2. Eminent Domain—Extension of Streets—Necessity—Evidence—Admissibility.—In a proceeding by a city to condemn a crossing over a railroad right of way for the purpose of extending a street to connect with another street, evidence that there were other ways, both near and remote, by which the other street and property in that section could be reached, and that with the proposed extension the blocks in that section would not be as long as they were in other sections of the city, was properly rejected as not being sufficient to authorize the court to substitute its judgment for that of the municipal authorities on the question of necessity.
3. Eminent Domain—Crossings—Condemnation—Measure of Damages.—In a proceeding by a city to condemn a crossing over a railroad right of way for a street extension the measure of the railroad company's damages is the difference in value between the exclusive and the joint use of its right of way.
4. Eminent Domain—Street Crossing Over Railroad—Condemnation—Damages—Evidence.—In a proceeding by a city to acquire a street crossing over a railroad right of way, evidence examined and held that a finding of \$250.00 as damages to the railroad company was not flagrantly against the evidence.

TRABUE, DOOLAN, HELM & HELM and BENJAMIN D. WARFIELD for appellant.

JOSEPH S. LAWTON and HARRY E. TINCHER for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

The general council of the city of Louisville enacted an ordinance authorizing the extension of Hillcrest avenue from the northerly line of the right of way of the Louisville & Nashville railroad across said right of way to the northerly line of Frankfort avenue, and directing the board of public works and the city attorney to take the necessary steps to condemn an easement over the railroad right of way. Subsequently an order was made by the board of public works directing the condemnation, and a suit was instituted by the city for that purpose. The jury fixed the railroad company's damages at \$250.00 and the company appeals.

It is first insisted that the trial court erred in excluding evidence tending to show that there was no necessity for the proposed extension. It is the established rule that the necessity for opening or extending streets, as well as the necessity for condemning rights of way for such purposes, is a matter which has been confided to the decision of the municipal authorities,

and their judgment is conclusive upon the courts unless it be made to appear that the use was palpably private, or the necessity for the taking was without any reasonable foundation. *L. & N. R. Co. v. City of Louisville*, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213. The offered evidence merely tended to show that there were other ways, both near and remote, by which Frankfort avenue and the property in that section might be reached, and that, with the extension of Hillcrest avenue, the blocks in that section would not be as long as they were in other sections of the city. In our opinion this evidence did not come up to the requirement of the rule, and was properly rejected as not being sufficient to authorize the court to substitute its judgment for the judgment of the municipal authorities on the question of necessity.

Another contention is that the measure of damages announced in the case of *L. & N. R. Co. v. City of Louisville*, *supra*, and followed by the trial court, excluded certain elements of damage to which the company was plainly entitled, such as the maintenance of a switchman's gate and house, and an annual expenditure for crossing protection, etc., and that that case should be overruled. That case was very carefully considered, and after an extended reference to the authorities and an elaborate discussion of the question, we concluded to adopt the measure of damages prescribed by the United States Supreme Court in the case of *Chicago, &c., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, and followed by the courts of many other states. In summing up the matter we said: "All that the company will be deprived of by the streets is the exclusive use of its right of way at these places, and the difference in value between the exclusive and the joint use is the full measure of its just compensation." While this measure of damages may leave something to be desired in the way of certainty, practically all rules for computing damages are subject to the same criticism, and a reconsideration of the question convinces us that it will be better to adhere to the rule complained of than to adopt a new rule including elements of damage that might never be sustained.

The further point is made that the verdict is flagrantly against the evidence which the jury considered, and had a right to consider, on the question of damages. In

support of this position, attention is called to evidence that the safety of the company's traffic, after the street was constructed, would require the removal of a spring-rail at a cost of \$250.00, and of other appliances at a cost of \$75.00, and to further evidence that the increased cost of maintaining the tracks would amount to \$85.00 per annum, or a total damage far in excess of that allowed by the jury. It must be remembered, however, that the evidence for the city tended to show that the diminution in the value of the use of the right of way was merely nominal. Furthermore, the evidence was conflicting as to whether there was any real necessity for removing the springrail and changing the other appliances, and even if necessary, the jury to whom the physical conditions were explained and the price of labor given were not bound to accept the estimates made by the company's witnesses. The same is true in regard to their estimates of the increased cost of maintaining the tracks, and the jury were not required to award the company such a sum as would, at six per cent interest, produce an income sufficient to represent the increased cost, but were merely required to consider the evidence as bearing on the diminution in the value of the use of the right of way. *L. & N. R. Co. v. City of Louisville*, 122 S. W. 849. In view of these considerations, we are unable to say that the verdict is flagrantly against the evidence.

Judgment affirmed.

Armstrong v. Commonwealth.

(Decided January 18, 1921.)

Appeal from Fayette Circuit Court.

1. **Robbery—Nature and Elements in General.**—Robbery is the felonious taking by a person of personal property from the owner or rightful custodian, by force or putting him in fear. But to constitute the crime it is not indispensably necessary that the force or putting in fear employed by the taker of the property shall precede the taking; if both, or either, precede or accompany the taking of the property, it will be sufficient.
2. **Robbery—Nature and Elements in General.**—The distinguishing characteristic of robbery is the employment of force or intima-

tion in taking from the person or in the presence of the owner or lawful custodian personal property; while larceny is a taking of such property by stealth, and may or may not be from the person or presence of the one in possession. As the evidence in the instant case showed beyond a reasonable doubt the taking by the appellant, both by force and intimidation, of a valuable diamond ring from the possession of the owner, he was properly convicted of robbery as charged in the indictment; therefore, the refusal by the trial court of an instruction authorizing the jury to determine whether he was guilty of grand larceny, was not error.

3. Robbery—Possession of Burglar's Tools—Evidence.—The admission on the appellant's trial of evidence that a search of his person by a policeman, following his flight and capture near the place of the robbery by that officer, disclosed his possession of a pair of brass knucks and some small saws, such as are used by burglars, was not error. Such evidence, in connection with the further evidence of the policeman as to appellant's possession at the same time of the diamond ring of which the owner had just been robbed and a pistol, such as was used in the commission of the robbery, was competent as tending to identify appellant as the perpetrator of the crime, also a motive for its commission and his preparedness for resorting to deeds of violence in committing robbery or kindred crimes.
4. Criminal Law—Failure of Defendant to Testify in His Own Behalf—Instructions.—An instruction telling the jury that the failure of the defendant in a criminal prosecution to testify in his own behalf should not be commented on, or considered by them as creating any presumption of his guilt of the crime charged, should not in every case necessarily be held to constitute reversible error. Whether it should be so regarded, would have to be determined by the facts of the particular case; but where, as in this case, the evidence so unerringly establishes the defendant's guilt as to convince the appellate court that the verdict of guilty returned by the jury, would have resulted, had the instruction in question not been given, the giving thereof by the trial court will not be held reversible error.

J. J. McBRAYER and FRANK L. McCARTHY for appellant.

CHAS. I. DAWSON, Attorney General, and THOS. B. MCCREGOR, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, James Armstrong, was tried and convicted in the Fayette circuit court under an indictment charging him with the crime of robbery, the punishment inflicted by the verdict of the jury and judgment of the

court being imprisonment of ten years in the penitentiary.

This court is asked to reverse the judgment appealed from on the following grounds assigned as error: (1) The admission by the trial court of incompetent evidence. (2) Refusal to peremptorily instruct the jury to return a verdict of not guilty. (3) Failure to properly instruct the jury. (4) Misconduct of Commonwealth's attorney in argument. In order that these several contentions may be properly understood, it will be necessary to state the material facts presented by the evidence showing the commission of the crime charged, which are undisputed. They are that on May 5, 1920, the appellant entered the jewelry store of F. J. Heintz in the city of Lexington and requested the latter to show him a diamond ring, saying he wished to purchase it to match one owned by his wife who was then in Cincinnati. Heintz was alone in the store, his clerk being at the time up stairs. Heintz at once took from a box in the show case and placed on the counter for appellant's inspection a ring containing a diamond cluster wrapped in tissue paper, which he recommended. He also placed on the counter similarly wrapped a ring with a single diamond, which, when opened, appellant seemed to prefer. While this diamond ring was lying on the open paper appellant commanded Heintz to throw up his hands and pointed a pistol to his face. Instead of throwing up his hands Heintz called loudly to his clerk and dodged behind the counter, then arose intending to grab the diamond ring, but this he was prevented from doing by a shot fired at him by appellant with the pistol, followed by two others, one of the three striking and passing through his arm. Appellant then ran, carrying the diamond ring with him. He was followed to the door and down the street by Heintz, whose shouts caused a policeman to intercept and arrest him. Upon being searched by the policeman appellant was found in possession of the diamond ring of Heintz and with the ring there was taken from his person a pistol, pair of brass knucks and some small saws, such as are used by burglars.

The alleged incompetent evidence complained of was that respecting the finding of the brass knucks and saws on his person by the policeman. This evidence, in connection with appellant's possession of the ring of which

Heintz had just been robbed and the pistol by means of which the robbery was effected, was clearly competent, as it tended to identify him as the perpetrator of the crime, also to prove a motive for its commission by him and his preparedness for resorting to deeds of violence in accomplishing it.

The appellant's complaint of the trial court's refusal to direct a verdict of acquittal is equally without merit. It seems to be based on the claim of a variance between the allegations of the indictment and the evidence; it being argued by his counsel that whatever force was used by appellant upon or toward Heintz was employed after he obtained possession of the ring, and that to constitute robbery the force must have been used or Heintz put in fear previously to his being deprived of the ring. This contention is not supported by the evidence, nor does it correctly state the law, for it is not indispensably necessary that the force employed or the putting of the person robbed in fear should precede the taking of the property. It will be sufficient if both or either accompany the taking of the property, and, that was the case here. Heintz and appellant were the only persons present when the ring was taken by the latter and the testimony of Heintz, which was uncontradicted, clearly shows that the diamond ring was taken by appellant when or immediately after he pointed his pistol at him and ordered him to throw up his hands, or while he was shooting at him; and in any event there can be no doubt that the taking of the property constituted robbery, as it was effected both by force and putting the owner in fear. The distinguishing characteristic of robbery is the employment of force or intimidation in taking from the person or possession of the owner or custodian personal property, while larceny is, ordinarily, a taking of such property by stealth and may, or may not, be from the person or presence of the one in possession. Any force sufficient to take one's property against the will is robbery. *Graves v. Comlth*, 186 Ky. 479; *Adams v. Comlth*, 153 Ky. 88; *Stockton v. Comlth*, 125 Ky. 268; *Brown v. Comlth*, 135 Ky. 635; *Blanton v. Comlth*, 139 Ky. 411; *Jones v. Comlth*, 112 Ky. 689; *Breckenridge v. Comlth*, 97 Ky. 271; *Davis v. Comlth*, 21 R. 1295.

In *Graves v. Commonwealth*, *supra*, the defendant by suddenly assaulting and overpowering the owner took from his person his gold watch and chain and escaped

with them by flight. In *Brown v. Commonwealth, supra*, a pocket book containing \$6.00, was suddenly and unexpectedly to the owner snatched from his hand by the defendant immediately followed by the swift flight of the latter. In *Jones v. Commonwealth, supra*, the defendant snatched from the hand of the owner a pocket book so quickly that the latter did not have time to actively resist. In *Davis v. Commonwealth, supra*, money was suddenly snatched by the defendant from the hand of the owner. It will thus be seen that in none of these cases did the force or putting in fear precede the taking of the property, but in each instance accompanied it; the force and taking of the property being one and the same act and the force consisting of the violence employed in taking the property. It will further be found that in each of the cases cited it was held that the perpetrator of the crime was not guilty of grand larceny, but of robbery as charged in each indictment.

It follows from the foregoing statement of the law, as well as what has been said of the evidence, that the failure of the trial court to direct a verdict of acquittal, was not error. Appellant's third contention, making complaint of the trial court's refusal to give an instruction under which the jury might have determined whether he was guilty of grand larceny, instead of robbery, is without merit. According to the evidence, there was no such absence of force as would have authorized a verdict finding him guilty of larceny, a lower degree of the crime charged in the indictment. On the contrary the evidence conclusively proved the force employed by appellant in taking the diamond ring and the felonious intent with which he took it, thereby establishing his guilt of the crime of robbery, of which he was rightly convicted. The only defense interposed by him on the trial was that of insanity, the evidence of which, though furnished, in part, by experts, was far from satisfactory. At any rate it was so regarded by the jury and their verdict, holding the evidence insufficient to prove such insanity, will not, on appeal, be disturbed, as the question was submitted to them by a proper instruction from the court, and the record affords us no ground for declaring it unsupported by the evidence.

Yet another complaint urged by appellant as a part of his third contention is that he was greatly prejudiced

by the action of the trial court in giving the jury the following instruction:

"The failure of the defendant to testify in his own behalf raises no presumption of guilt, and the jury is not to infer guilt from that fact."

This instruction follows in large part the language of the Criminal Code, section 223, subsection 1, which as a whole provides:

"That in all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her."

In *Tines v. Commonwealth*, 25 R. 1233, an instruction similar to the one here in question was condemned and the giving of same by the trial court held to be error. But this ruling was eminently proper because of a greater error previously committed by the trial court in permitting the reading to the jury by the Commonwealth of an affidavit the defendant, before the trial, had improperly been procured to make, and which purported to explain, in a manner inconsistent with the innocence of the affiant, his possession of property he was indicted for breaking into a warehouse and stealing. As the defendant had not testified in his own behalf on the trial, the instruction by telling the jury that no presumption of guilt could arise from his failure to orally testify, gave emphasis to the fact that his affidavit, which improperly had been read to them, and was still before them, furnished an all powerful reason for his failing to testify and, being unexplained or denied by him, it, in connection with other evidence in the case, was sufficient to establish his guilt. Under the circumstances nothing could have been more hurtful to the rights of the defendant than such an instruction. As other and more glaring errors stated in the opinion compelled the reversal of the judgment in the case, *supra*, it cannot with certainty be told therefrom, whether the reversal would have been adjudged if the giving of the instruction in question had been the only error committed by the trial court.

It is certainly the safer practice for a trial court to refrain from giving in any criminal or penal prosecu-

tion, in which the accused fails to testify, an instruction like that complained of in the instant case. But we are not prepared to say that in any and every case the giving of such an instruction would necessarily constitute reversible error. Whether it should be so regarded would have to be determined by the facts of the particular case. In several cases we have held that remarks of counsel in argument commenting or reflecting upon the failure of the defendant to testify, while reprehensible, was not prejudicial error under the peculiar facts of those cases, when attended or immediately followed by a proper reprimand or admonition from the court to counsel as to the impropriety of such argument or statement and telling the jury not to consider what had been said by counsel. *McDonald v. Commonwealth*, 177 Ky. 224; *Hinton v. Commonwealth*, 134 Ky. 511.

In view of the evidence of appellant's guilt furnished by the record before us, we are unwilling to declare the giving of the instruction in question so prejudicial to his substantial rights as to compel the reversal of the judgment, for, as a whole, it points so unerringly to the guilt of the defendant, as to leave him no loophole of escape and forces upon us the conviction that the same verdict would have been returned by the jury had the court not given the instruction complained of.

The alleged misconduct of the Commonwealth's attorney complained of in the fourth and final ground urged by appellant for a reversal, occurred while he was making the closing argument to the jury, and consisted of his pointing his finger at appellant and saying to the jury: "If you (meaning appellant) are an insane man, I never saw one." There was no impropriety in counsel's thus calling the attention of the jury to the appellant and expressing his disbelief of the latter's insanity; nor to argue that such insanity was not indicated by his appearance or bearing. It is absurd to say counsel's conduct or statement could have had any reference to the appellant's failure to testify in his own behalf. The issue as to the appellant's alleged insanity was one that he brought into the case and upon which proof was heard, and both the conduct and statement of the Commonwealth's attorney complained of bore upon that issue and were legitimately employed together with the evidence given by witnesses to enlighten the jury thereon.

As the appellant had a fair trial, the evidence authorized the verdict returned by the jury and the punishment thereby imposed was both reasonable and just, the judgment of conviction must be and is affirmed.

Hill, et al. v. Adams, et al.

(Decided January 18, 1921.)

Appeal from Simpson Circuit Court.

1. Descent and Distribution—Liens for Debts Against Estate.—In this action brought by a creditor under Civil Code, sections 428-429, to subject the real estate of the deceased debtor to his lien debt thereon, and to which the decedent's widow and infant children were made defendants, as it was neither alleged in the petition nor proved that the decedent left no personal property out of which the debt or some part thereof could be paid, the circuit court, in the absence of such a showing, was without power to adjudge a sale of the real estate for the debt sued on. Nothing is to be presumed against, nor taken as confessed by, an infant.
2. Descent and Distribution—Indivisibility of Land—Description—Evidence.—The description of the land contained in the petition and exhibits filed therewith, and depositions of witnesses, sufficiently showed the indivisibility of the land and necessity for selling it as a whole. Even in the absence of proof, if the question of the divisibility or indivisibility of the land can be determined by the circuit court from the description thereof contained in the petition and disclosed by the title papers filed therewith, the judgment of sale will not on appeal be reversed because of the court's refusal to require proof as to the matter.

WHITESIDES and BRADSHAW for appellant.

EVANS and MILLIKEN for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This action was brought in the court below by the appellee, W. W. Adams, to recover the amount of a past due note, originally of \$800.00, but reduced by payments to \$690.00, on which he was surety for his son, M. B. Adams. The note was executed by the son to W. R. Hobdy in part payment of the purchase price of a 63 acre tract of land in Simpson county conveyed him by the latter and was secured by a vendor's lien retained in the deed. The son after making the several small payments credited on the note died intestate, survived

by his wife, Mary F. Adams, and two infant children, Velma and George Adams, the former over and the latter under fourteen years of age, and neither of whom had a statutory or other guardian or committee. The widow married W. E. Hill and she and her husband, as well as the infant children of M. B. Adams, were made defendants to the action and all duly served with summons. Hobdy assigned the above note to one Martin, following whose death it was paid to his administrator by appellee.

The facts thus far stated appear from the petition and are uncontroverted. The widow and her husband failed to answer, but a guardian *ad litem* appointed by the court filed the usual formal report for the infants. It was alleged in the petition that the land upon which the vendor's lien existed for the payment of the note sued on could not be divided without impairing its value, and this fact was proved by the depositions of two witnesses. The prayer of the petition asked for the enforcement of the vendor's lien by the sale of the land or enough thereof for the payment of appellee's debt. Judgment was rendered by the circuit court which in substance directed the commissioner to sell the land as a whole and take a bond payable to appellant for the amount of his debt, and then a bond payable to himself for the surplus proceeds of the sale, for the benefit of the appellants, widow and children of M. B. Adams, to be thereafter distributed by the court as their interest might appear.

The sale was had at which the land was purchased by appellee, W. W. Adams, at the price of \$4,725.00, which was more than \$500.00 over its appraised value and \$3,969.96 more than his debt, and for the latter amount the commissioner took a separate bond conditioned as directed by the judgment.

After the filing of the report of sale, the appellants filed exceptions thereto and at the same time moved to set aside the judgment. The exceptions and motion were overruled and the sale confirmed. Appellants complain of the judgment of sale and of these rulings, and have appealed. The objections raised both by the motion and exceptions substantially were and are, that the court was without jurisdiction to adjudge a sale of the land on the showing made by the petition, it being claimed that nothing was to be taken as confessed by the infant ap-

pellants and that the allegations of the petition and proof taken failed to show the indivisibility of the land or necessity for its sale; and that it was neither alleged nor proved that the decedent, M. B. Adams, did not leave sufficient personal estate to pay in whole or part the debt of appellee and others that he might have been owing; and that in no event should the judgment of the court have directed a sale of more than enough of the land to pay the appellee's debt. In order to subject an infant's real estate to his ancestor's debts, the provisions of sections 428 and 429, Civil Code, must be substantially complied with, and the question whether the land is divisible is not of itself the only determining factor in a sale under those sections. There might be a division without materially impairing the value of the land, and yet such division might result in the material impairment of the interest of one or more of the joint owners, and it is alleged in the petition that a division of the land would materially impair its value. There was here proof sufficient to show the indivisibility of the land; and it has been held, even where the lands were owned by infants, that if this question can be determined by the court from the description and quantity of the land as disclosed by the statement of facts contained in the petition and shown by the title papers filed therewith, the judgment of sale would not be reversed because of the court's failure to require proof as to the matter. *Finney v. Finney*, 144 Ky. 114.

Without taking up the other objections in detail, we are constrained to hold that the one complaining of the failure of the record to show the insufficiency of the decedent's personal estate to pay his debts we regard fatal to the judgment and sale. In other words it does not affirmatively appear from the record before us either by necessary allegations or by proof that the personal estate of the decedent was insufficient to pay his debts, and as under the sections of the Code, *supra*, and the rulings of this court this is indispensably necessary, the sale of the land herein cannot be approved, for nothing can be presumed against an infant. *Luscher v. Julian's Admr.*, 173 Ky. 151; *Ford v. May*, 157 Ky. 830; *Melcher v. Yager's Guardian*, 159 Ky. 597. It is true the petition alleges that there was not sufficient personal estate left by M. B. Adams to pay his debts, but this was only a conclusion of the pleader and leaves the implication that

the decedent did leave some personal estate, but there is no averment as to the amount or value thereof, nor as to the amount of debts he was owing; nor is it alleged that there had been a settlement of his estate; and, obviously, if there was personal estate that could have been applied to the payment of appellee's debt, in whole or in part, the lien retained on the land to secure its payment could not have been enforced, except to the extent that the exhausting of the personalty left it unpaid; and as none of these facts appear from the petition or are shown by proof, the lower court was without authority to render the judgment appealed from.

For the reasons indicated, the judgment is reversed and cause remanded with directions to the lower court to sustain the appellant's exceptions and motion referred to, and to set aside the judgment appealed from, leaving the parties to take such steps as will empower the circuit court to properly compel by the enforcement of his lien, the payment of appellee's debt.

Bridwell v. Beerman.

(Decided January 18, 1921.)

Appeal from Hardin Circuit Court.

Easements—Prescriptive Use—Erection of Gates.—A passway may be established by prescription and when established its condition cannot be altered so as to reduce the rights of the claimant without his consent, and if the passway be set off by fencing so as to make a lane and no gates have been placed upon it during its establishment by user, none can be placed there by the owner of the servient estate without the consent of the owner of the dominant estate.

IRWIN & IRWIN and H. L. JAMES for appellant.

L. A. FAUREST for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Bridwell owns a farm in Hardin county fronting on the Hodgenville pike. Back of and adjoining this farm appellee Beerman owns a farm which he reaches by means of a passway leading from the Hodgenville pike over the land of Bridwell. This passway had been open and in use for thirty or forty years before the commence-

ment of this litigation. Beerman and his predecessors in title have used the passway as a matter of right for a long number of years. This right of way was originally acquired by prescription and was fenced on both sides so as to make a lane, but there were no gates on it.

A short time before the institution of this action, but long after the right to the passway was perfected by prescription in Beerman, Bridwell erected a gate across the passway several hundred yards from the pike, and not at the termini of the passway. This was contrary to the wishes of Beerman and when Bridwell refused to remove the gate, Beerman brought this action against him charging the gate to be an obstruction to his use of the passway, praying its removal and for damages. After denying the material allegations of the petition, the answer averred that the use of the passway by Beerman was permissive only, and further that the gate was not an obstruction, but was placed there by the defendant for the purpose of enclosing his lands; that said gate was necessary to the reasonable use of his lands and was not an unreasonable obstruction of the use of the passway; that it was kept in good repair, at a suitable place and could be conveniently opened and closed by people traveling the passway.

A trial resulted in a judgment for the appellee Beerman, and Bridwell appeals. His first insistence is that Beerman had no right of passway over the lands of appellant; that the use was permissive only. The trial court found to the contrary and we are persuaded the judgment on this point is sustained by the great weight of the evidence. Many persons who have lived on the lands in question and in the neighborhood testified that the passway had been in constant use by the public for a very long time, some of them saying as long as forty years; many of them had known it as a public way for as long as ten to twenty years before this suit was commenced. Under facts like these the burden is on the owner of the servient estate to show the use was permissive only. *Smith v. Penington*, 122 Ky. 355; 9 R. C. L. 781. In brief of appellant Bridwell it is practically confessed that the appellee Beerman had the right to use the passway, but it is very earnestly insisted that even so, the appellant had and now has the right as the owner of the servient estate, to erect and maintain gates

across it, and this is the only real point in controversy in the case.

The question then is, can the owner of the servient estate, after another has acquired and perfected a right by prescription to an unobstructed passway over his lands, enter thereon and erect gates across the passway, even at the termini of the passway, so as to aid him in enclosing his lands without the consent of the claimant of the passway, if it be a private one, or of the public if it be a public passway?

This inquiry must be answered in the negative, if as in this case, the passway be a lane in which no gates or other obstructions had ever existed.

The rule is stated as follows in 9 R. C. L. 788 *et seq*:

"Where an easement is proved to exist by prescription, the common and ordinary use which establishes the right also limits and qualifies it. . . . Unquestionably he cannot close or obstruct an easement against those who are entitled to its use in such manner as to prevent or to interfere with their reasonable enjoyment.

. . . However in some jurisdictions it is maintained that such a grant will not admit of the construction or maintenance of gates or fences across such way. The owner of land over which a right of way 'as now laid out' has been granted has no right in the absence of evidence of a contrary usage, to erect a gate at the entrance of the way, no gate being erected at the time of the conveyance.

"If the way acquired by use, although well marked and defined, is restricted, during the time required for the establishment of the right, to a use and enjoyment thereof with bars or gates across it, the right acquired will be restricted to the same extent; and if, on the other hand, the way be well defined and fenced, and used as an open and unobstructed way during the period necessary to confer the right, the party acquiring this right of way has the right to continue to use the same in its unobstructed condition and the owner of the servient estate has no right to change said way to another and different locality over his land, and obstruct the new way with gates." *Rogerson v. Shephard*, 33 W. Va. 307; 48 L. R. A. (N. S.) note 92. See also *Goddard on Easements*. *Jones on Easements*, section 415.

An easement free from obstruction cannot be burdened, changed or lessened in any way by the owner of the

servient estate except with the consent of the holder of the easement. It is a vested property right. If it were acquired free from gates and other obstructions its free and open character will continue indefinitely.

This rule is well stated in *Miller, &c. v. Pettit*, 127 Ky. 419, where we said:

"It has been held that where the way was acquired by prescription and is used as a lane free from gates during the period necessary for perfecting the title, none can be erected afterwards. The passway in question was established in 1843, it has been used since that time as far back as the witnesses can remember. Until recent years there was a fence on both sides of it and no gate except where the passway began at Millers line. If the right of the passway may be acquired by prescription we can see no reason why a passway free from gates may not be acquired in a like manner; and where the passway is fenced off as a lane, and is used as such for thirty or forty years, it must be presumed after such a great length of time, when the parties are all dead, that the persons using the passway were the owners of a right of way, as they held it and used it."

In *Hunt, et al. v. Sutton*, 188 Ky. 361, we held that an owner of land may ordinarily erect gates over a passway where it enters and leaves his land but that where the way is acquired by prescription and is used as an easement free from gates during the period necessary to perfect the title, none can be erected afterwards.

These cases are easily distinguished from the cases of *Maxwell v. McAtee*, 9 B. M. 20, and *Miller v. Miller*, 182 Ky. 789, where gates had been across the way from the beginning. A right to have and maintain a gate across a way may be acquired like other easements in real property and when once perfected continue indefinitely if exercised. Moreover, in these cases the passway was not fenced so as to make it a lane, but divided the lands of the servient owner into two parts. Such surrounding circumstances alter the case greatly. On such facts we have frequently held the servient owner has the right to erect a gate to enable him to enclose his farm, provided the gates are suitably located, built and equipped, so as to be easily opened and closed.

If one should acquire a passway by long use over and through the fields of a neighbor, and this passway was unfenced, the owner of the servient estate would have

the right to erect a gate or gates across the way to aid him in fencing his farm or in dividing it up into fields.

This right inheres in the landowner even though the right to the use of the passway be perfected by long use. Such a right is apparent from the necessity of the case. But the facts of the case under consideration are very different and do not warrant a presumption that any such right to erect gates across the way was in the minds of the parties, or was tacitly reserved, nor can such right be predicated upon the necessity of the case, for the way has been fenced as a lane all the years the right was maturing. *Lurker v. Ross*, 121 S. W. 647.

Finding no error to the prejudice of appellant the judgment is affirmed.

Steinke v. North Vernon Lumber Company.

(Decided January 18, 1921.)

(Common Pleas, Third Division).

Appeal from Jefferson Circuit Court

1. **Appeal and Error—Order Granting New Trial Not Final—Substitution of Verdict.**—Where a trial court wrongfully granted a new trial, the party aggrieved can not appeal from the order granting the new trial because it is not a final order, but if the verdict and judgment on the second trial be more unfavorable to him than the first he may on appeal from the second judgment have a review of the first proceeding and the order granting the new trial, and this court will, if the new trial was improperly granted, direct the substitution of the first verdict and judgment which was erroneously set aside for the second verdict and judgment.
2. **Appeal and Error—New Trial.**—Where there was sufficient evidence to sustain the verdict and there were no errors committed in the admission or rejection of evidence, and the instructions of the court correctly presented the law of the case and the record failed to disclose any sufficient reasons for the granting of a new trial, and the order granting the new trial assigns no reasons, the first judgment will be substituted for the second.
3. **Waters and Water Courses—Damages—Submission to Jury—Instructions.**—In an action to recover damages for the wrongful flooding of lands by diverting surface water from the upper estate on to the lower, any substantial change in the ditches or contour of the upper estate which took place within five years next before the bringing of the action, and which cast the water upon the lower estate in greater volume or with greater destructive force than that in which it ordinarily ran, to the damage of the lower estate, will warrant the trial court in submitting the

case to the jury, and the finding of the jury under proper instructions will not be disturbed unless palpably against the weight of the evidence.

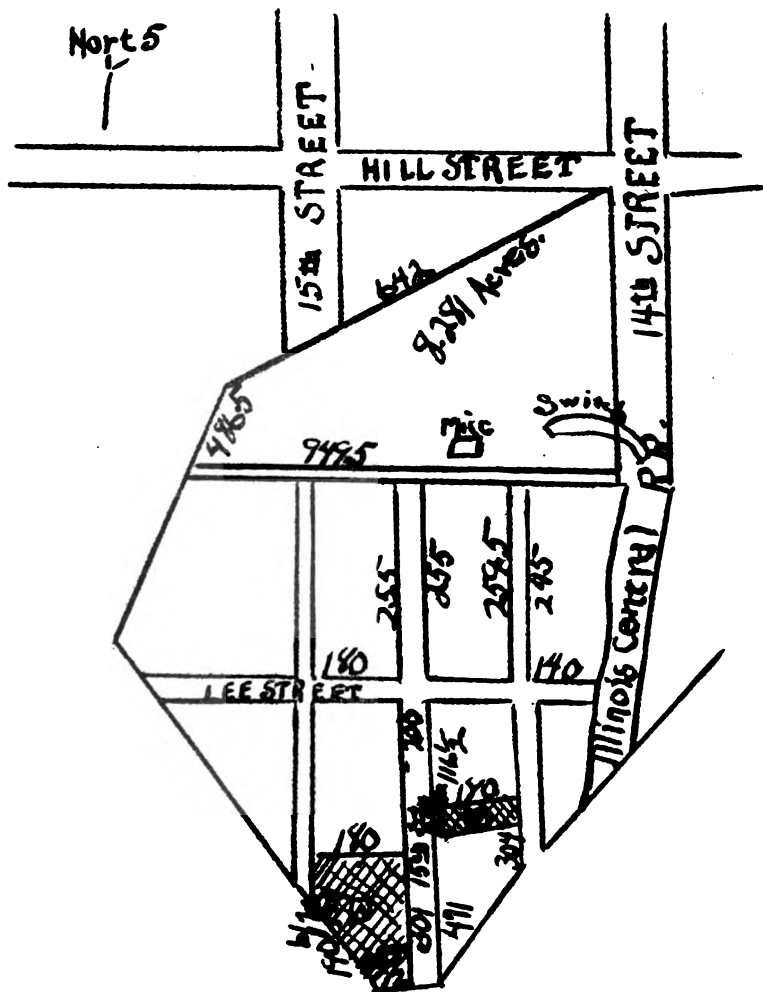
BURKE & LAWTON and EDWARD C. WURTELE, for appellant.

JOHN J. DAVIS, LEON P. LEWIS and BLAKEY, DAVIS & LEWIS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

Steinke is a gardener who owns two small plots of ground, and has in his possession under lease adjacent ground in the outskirts of Louisville on which he has for many years grown vegetables for market. Just north of and adjacent to his place, the North Vernon Lumber Company owns a tract of about eight acres on which it has a mill, lumber yard and railroad switch. The lumber company acquired its property after Steinke purchased his ground and began to garden in that vicinity in 1903 and 1904. The ground where the mill now stands was formerly used for gardening purposes. In fact, Steinke had cultivated it one or more years, and several other practical gardeners had also cultivated all, or part of it. This plot had two knolls, or high points, which rose eight or ten feet higher than the surrounding ground. Between these knolls was a sink or low place into which water ran and stood. The ground where Steinke now lives and has his garden is almost flat and somewhat lower than the mill property, but between the two properties is a little driveway which is somewhat higher than the ground on either side. Before the mill was erected the lumber company leveled down the two knolls or high points on its property, using the dirt to fill up the sag in which the water had theretofore gathered. The mill was built almost exactly on the spot where the sag had formerly been. The lumber company then dug ditches from its mill site in the direction of Steinke's line, to carry off the water. This was about the year 1905. Since that time the ditches have been cleaned out and enlarged according to the contention of Steinke so that the water has been gathered and cast upon his garden in greater quantities and in a different way from its natural flow to the great detriment of his truck patches and gardens, and this action was instituted by Steinke against the lumber company to recover for the loss which resulted from his ground being over-

flowed by surface water from the premises of the lumber company. The accompanying map will aid in understanding the lay of the ground and the relation of one tract to the other:



There have been two trials of the case in the circuit court. On the first trial the jury awarded Steinke \$500.00 in damages. Motion and grounds for new trial were filed by the lumber company and sustained by the court without assignment of reason. To the motion for a new trial Steinke objected, and excepted to the order granting it, and a bill of exceptions was thereupon prepared, approved and signed by the trial judge. The second trial resulted in a verdict for the defendant lumber company, and Steinke prayed an appeal from that as well as the former judgment, and insists that the former verdict and judgment should be substituted for the verdict and judgment rendered upon the last trial, because, he says, the trial judge in granting the new trial to the lumber company assigned no reason for doing so, and there in fact existed no sufficient or valid reason for granting the new trial. If the new trial was improperly granted without sufficient grounds therefor, or in violation of the rights of Steinke, the first verdict and judgment should be substituted for the latter and the present judgment reversed. If, however, errors occurred upon the first trial which warranted the trial court in granting a new trial, or which would have justified this court in reversing the judgment had no new trial been granted and had it been appealed here, then appellant is not entitled to have that verdict and judgment substituted for the verdict and judgment rendered upon the last trial of the case. We will, therefore, briefly examine the evidence and instructions of the court to determine the correctness of that judgment.

The motion and grounds for a new trial which was filed February 9, 1918, and which was sustained by the trial court contains the following:

1. The court erred in refusing to grant the motion of the defendant for a peremptory instruction at the close of the plaintiff's evidence, and again at the conclusion of all the evidence.

2. The errors of the court in admitting and refusing testimony to all which defendant objected and excepted at the time.

3. The court erred in giving instructions 1, 2, 3, 4, and each of same, to which defendant excepted at the time.

4. The court erred in refusing instructions 1 and 2 offered by defendant, to which defendant excepted at the time.

5. The verdict of the jury is contrary to the law and the evidence, and is flagrantly against the evidence.

6. The damages assessed by the jury are excessive and were given under the influence of passion or prejudice.

7. Error in the assessment of the amount of recovery in that the amount of the verdict is too large under the instructions of the court.

The trial court did not err in overruling the motion of the lumber company for a directed verdict in its favor made at the conclusion of plaintiff's evidence and again at the conclusion of all the evidence. The evidence shows that Steinke had owned and lived on part of the premises which he cultivated for some time before the lumber company acquired its ground, leveled it down and built its mill; that ditches were opened by the lumber company in which to gather and carry the water from its property to the line of Steinke; that these ditches were cleaned out, widened and deepened from time to time up to about the time of the bringing of this action and that this enlargement of the ditches caused a greater volume of water to be gathered in and to be carried on to the premises of Steinke and that this extra volume of water overflowed his garden, washed up his onions and potatoes and drowned out corn, beans and other vegetables; that on one occasion he planted twenty barrels of onion sets when a rain came and the water from the lumber company's ground was carried through the ditches on to his premises in such volume and with such force that it washed up his onions and he had to reset them; another rain came and washed them up a second time and he again reset them; and a third rain produced about the same result, so that he was required to set his onion crop about three times that year. He gave in detail his loss sustained in each of the five years next before the bringing of this action, because the trial court confined plaintiff Steinke to the loss sustained to his crops by reason of the overflow of water from the lumber company's lands which was an increase or augmentation of the flow of water coming from the lumber company's premises before the ditches were widened and deepened within the five years next before the action was com-

menced. The evidence also proved that before the lumber company acquired its grounds the water was gathered in the sag or low place about the point where the mill now stands and did not run off on to the premises where Steinke now gardens; that when the lumber company leveled its ground and filled up the low places in which water had theretofore gathered, the water was then cast in greater volume upon the Steinke premises. It further shows that while ditches were made on the lumber company's premises in 1905, they were enlarged from time to time up to the commencement of this action. The increased size of the ditches as well as the new ditches constructed by the company gathered a greater volume of water from the lumber company's premises and cast it upon the premises of Steinke in a different way and in greater volume from that which would naturally have gone thereon from the premises of the lumber company.

(1) The trial court could not, therefore, ignore this evidence and direct the jury to find and return a verdict for the lumber company. It correctly overruled the motion of the company for a peremptory instruction in its favor.

(2) There was no error committed by the trial court in admitting or refusing testimony at the first trial, at least there was no objection made by the lumber company to the introduction of evidence which was not sustained by the court except in two or three instances, to which attention will be called; and all objections made to the evidence of the plaintiff Steinke were sustained by the trial court. While Steinke was testifying and relating a conversation had between Mr. Hess, the foreman of the lumber company, and himself concerning the water running on to the garden, and had concluded his answer, counsel for the lumber company objected; the court overruled the objection no doubt upon the ground that the statements of the foreman of the lumber company with reference to letting the water run upon the premises of the gardener were competent. Certainly the statements of the person in charge of the lumber company's plant, it being a corporation, would be competent against it to show what had been done by the company with reference to turning water on to the premises of Steinke, and the court correctly so held. On the same page of the transcript of evidence the plaintiff was testifying to what had been said by a Mr. Stilson

who was sent by Mr. Platter, the president or general manager of the lumber company, to ask permission of Steinke to let the lumber company run its water into his field. Objection was made to this by counsel for the lumber company, and the court asked:

“Q. You say that this talk was with whom? A. With Mr. Stilson, what Mr. Platter sent down to me in 1916. By the Court: Well, he can answer.”

The company reserved exceptions. This evidence was also competent as tending to show what the company was preparing to do with the water from its premises and the court was correct in its ruling.

The same witness was about to tell what he had said to his wife on one occasion, when objection was made and the court sustained the objection and admonishing the witness, said “I told him not to state what he said to his wife.” Immediately following this, the witness was asked further concerning the conversation with the manager of the lumber company, to which objection was made and the court allowed him to answer. This was not error. These are the only objections made to the introduction of evidence, by counsel for the lumber company which were not sustained; and if the court had ruled otherwise than as it did, it would have been harmless error only, because none of the questions or answers, in the light of the whole record, were of sufficient importance to have influenced the jury in the slightest degree. In fact, they are largely inducement to other evidence which the plaintiff desired to introduce.

(3) The instructions given by the court fairly and substantially stated the law of the case. The first instruction told the jury that the owner of the higher or upper estate was not liable to the owner of the lower or servient estate for injury from water flowing from the upper on to the lower estate in the ordinary and usual way; but that if the owner of the upper estate changed the natural course of the water from its property or caused it to collect and to be cast upon the lower estate in a larger volume or in an unusual or swift stream, the owner of the upper estate is liable. The jury was further instructed that the grading of the lands by the lumber company and the filling up of the sag in which water had naturally gathered was a permanent improvement, and as it had happened more than five years before the commencement of this action no re-

covery could be had on that ground. In fact, the first instruction allowed the jury to make no finding for the plaintiff Steinke. The second instruction told the jury that if it believed from the evidence that subsequent to the grading of the land and the construction of the ditches mentioned and within five years next before the commencement of the action the lumber company had so changed the surface of its property or enlarged the ditches originally constructed, or built new ditches, the result of which, under the evidence, was to collect the water upon the lands of the defendant company and to cast it upon the cultivated property of Steinke in an unusual volume or quantity, or in a different manner from its natural course, and thereby the crops of Steinke were injured, its verdict should be for the plaintiff Steinke, but unless it so believed from the evidence its verdict should be for the defendant company. The third instruction told the jury that if the overflow of the lands of Steinke was caused by extraordinary rains or flood, that is, such rains and floods as were of unusual occurrence in that vicinity and could not have been anticipated by persons of ordinary experience and prudence, the verdict should be for the defendant company.

The fourth instruction contained the measure of damages. By it the jury was told that if it found for the plaintiff it should award him such sum in damages as the jury believed from the evidence would fairly and reasonably compensate him for the fair market value of the crops destroyed, if any, not to exceed the sum of \$1,200.00. These instructions were all that were given, and substantially and fairly presented the law of the case. They are almost exactly the same as those given on the last trial which appellee insists are the law of the case.

(4) The defendant company offered two instructions which the court declined to give, as offered, but which were in substance included in that given by the court. No error therefore was committed in this regard.

(5) Complaint is made that the verdict is contrary to and flagrantly against the evidence, but there is no real basis for such complaint because there is abundant evidence to support the verdict as shown by the foregoing brief review thereof.

(6-7) If the plaintiff Steinke was entitled to recover at all, the amount awarded him, \$500.00, was not

excessive. The evidence shows that he lost several crops of vegetables, the amount and value thereof, and when these amounts are cast up, the total sum is much greater than \$500.00.

It is insisted by the lumber company that the appeal granted on July 10, 1919, from the judgment entered in April, 1918, in the first trial, by the trial court is a nullity, and so much of this appeal as relates to the first trial of the case should be dismissed. With this we can not agree. No appeal from the order granting a new trial would lie because there was no final judgment. *Mergenthal v. Southern Covington Railroad Company*, 104 Ky. 424; *Schweitzer v. Irwin's Exor.*, 19 Ky. Law Rep. 624; 41 S. W. 265; *Chrisman v. Chess, Wymond & Co.*, 19 Ky. Law Rep. 1244; 43 S. W. 426; *Miller v. Ashcraft*, 98 Ky. 314.

As no appeal would lie from the order granting a new trial Steinke was obliged to abide his time and all he could do was to save proper exceptions to the order granting a new trial. Such an order is interlocutory in its nature and although it may be highly prejudicial, the injured party must wait until the court finally disposes of the case and then take an appeal from the judgment, and carry up the former judgment and bill of exceptions. That was done in this case. When such a course is pursued this court may review the action of the lower court in setting aside the verdict and judgment upon the first trial, and if it be convinced that there was no substantial ground for the granting of the new trial, that the new trial was in violation of the rights of the complaining party and that the judgment would not have been reversed had the new trial been refused, and the case appealed to this court, it may order a reversal of the final judgment and the substitution of the first verdict and judgment in lieu thereof. *L. & N. v. Mitchell*, 87 Ky. 327; *Nolan's Admr. v. Standard Sanitary Mfg. Co.*, 33 Ky. Law Rep. 745; *Meek v. Patten*, 12 Ky. Law Rep. 796; *Smith's Admr. v. Louisville Ry. Co.*, 174 Ky. 784; *Louisville College of Dentistry v. Hartford Steam Boiler & Perkins Ins. Co.*, 185 Ky. 778; *Perkins v. Ogilvie*, 148 Ky. 309.

Of course the trial court has a broad discretion in granting and refusing a new trial, but this discretion must not be abused, and it is abused by the granting of a new trial where no sufficient or sound reason exists

or is shown therefor. Nor can it travel outside the record to find grounds for such new trial. In this court the same rule prevails and we will not go outside the record as presented to surmise that the trial court may have known some fact or been impressed by some act or conduct of the witnesses or counsel occurring at the trial which does not appear of record, in granting the new trial. If such ground for a new trial existed the court should have so set forth in his order sustaining the motion for a new trial. The court in granting a new trial assigned no reason whatever. The order reading: "The verdict and judgment entered herein be and the same are hereby set aside and held for naught and the defendant granted a new trial." If there were any reasons why a new trial should be granted other than those appearing in the record the trial court probably would have set them forth.

Undoubtedly the trial court granted a new trial because it was of opinion that there was not sufficient evidence to sustain the verdict. In this is was in error because a review of the evidence confirms us in the belief that there was sufficient evidence to take the case to the jury and to sustain the verdict. While there are many contradictions in the evidence and some irreconcilable conflicts, the jury had the right to judge the credibility of the witnesses and to determine from the evidence what damage, if any, had been occasioned to the crops of Steinke by the increased flow of the surface water from the premises of the lumber company, according to the instructions of the court and the measure of damages therein contained. A trial court has no right to disturb the finding of a jury and grant a new trial merely because it may not agree with the verdict of the jury, if the evidence be sufficient to support it, as was true in this case. This court will not disturb a verdict of a jury unless it be palpably against the weight of the evidence. The circuit court must be governed by a similar rule.

We conclude therefore that the trial court erred in sustaining the motion and grounds for a new trial and in granting the new trial. The judgment is reversed with directions to the lower court to set aside the verdict and judgment entered upon the second trial and in lieu thereof substitute the verdict and judgment returned and entered on the first trial.

Judgment reversed.

Birney v. Ballard County.

(Decided January 18, 1921.)

Appeal from Ballard Circuit Court.

1. **Officers—County Road Engineer—Term.**—The amendment of 1918 to the act of 1914 creating the office of county road engineer did not definitely fix the time at which the term of office of county road engineer should expire as the first of January, but expressly provides that such engineer shall serve a period of two years from and after the first day of January, and until his successor is appointed and qualified.
2. **Officers—Holding Over—De Jure Officer.—Salary.**—Where one is holding an office for a specified term and until his successor is elected and qualified, if at the expiration of the specified term no one capable of holding the office has been elected and qualified, the incumbent may hold over, and the hold over period is as much a part of his term of office as was that before the expiration of the specified term, and during such period he is a de jure officer and as such may maintain an action for his salary.
3. **Judgment—Plea in Bar.**—An attempted plea in bar which does not show such identity of the issues involved in the instant case and those involved in the former action, the judgment in which is relied on in bar, and which does not allege facts showing that the matter in issue was actually and necessarily litigated in the former action, is an insufficient plea in bar.

BROWN, LOGAN & MYATT, HENRY F. TURNER and J. B. WICKLIFFE for appellant.

M. C. ANDERSON for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

Under an act of the legislature approved March 23, 1914, there was created in the several counties in this state the office of county road engineer. The term of such officers was to begin on the first of October, 1914, and continue for two years “and until his successor is appointed and qualified:” subsection 39, page 357, Acts 1914.

The general assembly of 1918 by an act approved March 26, 1918, amended that act, being section 4325, Kentucky Statutes, Carroll’s edition 1915, so that the term of office of the county road engineer should begin the first of January following his appointment instead of the first of October and continue for two years and

until his successor was appointed and qualified, and further sought to extend the terms of the county road engineers then in office from the first of October, 1918, to the first of January, 1919, the concluding sentence in which amended act being: "The county road engineers who are now in office shall continue to serve as such until the first day of January, 1919, unless sooner removed pursuant to the provisions of section 4326 of Kentucky Statutes."

Appellant in the fall of 1916 was appointed road engineer of Ballard county, qualified as required by law, and was in office at the time of the passage of the amendment of 1918, and continued to serve under the terms of that amendment until the first of January, 1919. At that time no successor having been appointed he continued during the first six months of 1919 to hold office and perform the duties thereof, there being no other claimant, and he being the incumbent prior to the first of January, 1919, under his appointment in 1916.

Prior to his appointment in 1916 the salary had been fixed at one thousand dollars per annum, and in February, 1919, the fiscal court entered an order allowing appellant his salary of \$83.33 $\frac{1}{3}$ for the month of January, 1919, and from that order the county of Ballard appealed to the circuit court, and it was there adjudged in April, 1919, as alleged in the answer that he was not entitled to recover such salary.

Again in April, 1919, the fiscal court allowed appellant his salary for the months of February and March of that year, amounting to \$166.66, and the county of Ballard appealed from that order to the circuit court, and on that appeal it was adjudged by the circuit court, as shown by the answer, that appellant was the county road and bridge engineer of Ballard county, Kentucky, during the months of February and March, 1919, but that he was not entitled to pay therefor as such.

In August, 1919, appellant as plaintiff instituted this action wherein he, in substance, alleges his appointment in 1916, his qualification and his service, and that no successor had ever been appointed by the fiscal court, and that there was no other claimant to the office, and that after the first of January, 1919, he had continued to discharge the duties of the office, and asking for a judgment of five hundred dollars for his salary during the first six months of that year.

The county answered, admitting, in substance, the allegations of the petition, but setting up the amendment of 1918 and claiming thereunder that appellant's term of office had definitely expired on the first day of January, 1919. It further set up the two orders of the fiscal court of Ballard county hereinbefore referred to wherein appellant had been allowed his salary for the three months of January, February and March, and alleged that the county had appealed from each of those orders, and says as to the first appeal that it was adjudged by the circuit court "that the plaintiff, R. I. Birney, was not entitled to recover of the defendant, Ballard county, Kentucky, the sum of \$83.30 for services as county road and bridge engineer of Ballard county, Kentucky, for the month of January, 1919;" and it is alleged therein that upon consideration of the second appeal by the circuit court that it was adjudged therein "that R. I. Birney, who is plaintiff in this action, was the county road and bridge engineer of Ballard county, Kentucky, during the months of February and March, 1919, and was not entitled to receive any pay therefor as such . . . for the months of February and March."

The circuit court overruled a demurrer to this answer, and the plaintiff declining to plead further, his petition was dismissed and he has appealed.

The two questions for consideration are: first, under the terms of the amendment of 1918 did appellant's term of office definitely expire on January 1, 1919, or did he have a right, there being no successor appointed and qualified, to hold over? And, second, did the judgments of the Ballard circuit court upon the two appeals from the orders of the fiscal court, or either of them, operate as a bar to appellant's right to maintain this action, either for the whole period of six months, or for any part thereof? The two questions will be considered in the order named.

(1) An examination of the original act of 1914 and of the act as amended in 1918 will disclose that the latter only made, or undertook to make, two changes in the original act. The first change was to make the term begin the first of January succeeding the appointment instead of the first of October, and the second was to undertake to extend the terms of the existing county road engineers by three months, that is, from the first of October, 1918, until the first of January, 1919. The con-

cluding sentence in the amendatory act that "The county road engineers who are now in office shall continue to serve as such until the first day of January, 1919, unless sooner removed" had for its sole purpose the extension of the existing term of office of those then serving and can in no sense, or by any reasonable interpretation, be construed as meaning to definitely fix the time at which the term of office of the existing officials should expire; to so hold would be to give no effect whatsoever to the express language of that amendatory act that the road engineer "shall serve a period of two years from and after the first day of January, and until his successor is appointed and qualified." These two provisions in that section must be interpreted so as to harmonize with each other; the one was inserted for the purpose of changing the time when the term of subsequent road engineers should begin, and the other was inserted so as to declare the legislative policy of having some one in the office to attend to the duties thereof after the time fixed at which the term ordinarily expired if his successor had not then been appointed and qualified, and the two are in no wise conflicting when so construed.

It is the rule that where one is holding an office for a specified term and until his successor is elected and qualified, and at the expiration of the specified term no one capable of holding the office has been elected or qualified, he may hold over, and the period between the expiration of the specified term and the time when his successor may be elected and qualified is as much a part of his term of office as was that part before the expiration of the specified term, and during such period he is neither an usurper nor a mere *de facto* officer, but is a *de jure* officer and as such may maintain an action for his salary. *Lafferty v. Huffman*, 99 Ky. 80; 22 R. C. L., sec. 257-8, p. 554; sec. 320, p. 598.

(2) In the attempted plea in bar by reliance upon the judgments of the circuit court in the two appeals from the fiscal court the two judgments of the circuit court are referred to as a part of the pleading, but are not copied in the transcript; neither is there exhibited in the pleading or copied in the transcript any of the pleadings or proceedings in the circuit court on either of those appeals. So we must rely wholly upon the allegations of the answer in this case to determine whether a good plea in bar has been presented.

The answer, in setting up the appeal from the fiscal court involving the January salary, alleges that "by judgment of Ballard circuit court duly and regularly entered it was held and adjudged that the plaintiff, R. I. Birney, was not entitled to recover of the defendant, Ballard county, Kentucky, the sum of \$83.30 for services as county road and bridge engineer of Ballard county, Kentucky, for the month of January, 1919."

As to the second appeal, involving the salary for February and March, it is alleged "and a judgment was duly and regularly entered thereon in the Ballard circuit court adjudging that the then defendant, R. I. Birney, who is plaintiff in this action, was the county road and bridge engineer of Ballard county, Kentucky, during the months of February and March, 1919, and was not entitled to receive any pay therefor."

We will consider the sufficiency of this pleading as if it were alleged therein on the latter appeal that Birney was adjudgd *not* to be the road and bridge engineer of Ballard county, as it may be that in the transcript before us the word "not" after the word "was" is omitted.

It will be observed that as to neither of these judgments which are relied upon in bar is it alleged that the title to the office of road engineer was directly or necessarily involved; it is not shown what were the issues on either of these appeals as the basis of the judgments of the circuit court; there is nothing in the pleading which shows what the issues were or upon what ground the judgments, or either of them, were entered. For aught that appears on the face of the pleading the judgments denying him compensation may have been entered because he had failed to attend to his duties or for many other reasons which might not involve his right to hold the office. In other words, there is no such identity of the issues involved in this case and of the issues involved on those two appeals, so far as disclosed by the answer, as will make the judgments entered therein a bar to this action, or to the plaintiff's recovery of the salary other than that directly involved on the two appeals if any of it was so involved.

"Where the record is such that the issues in the second suit may not be the same as those decided in the former action, the judgment will not constitute an

estoppel unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question or matter in dispute was actually and necessarily litigated and determined in the former action." 15 R. C. L., sec 531, p. 1049.

We conclude, therefore, that the answer in neither aspect of it presented a good defense to this action, and that the demurrer thereto should have been sustained; but upon a return of the case the court will permit either party to amend his pleadings and present the issues.

The judgment is reversed for further proceedings consistent herewith.

Bosworth v. City of Middlesboro, et al.

(Decided January 18, 1921.)

Appeal from Bell Circuit Court.

1. **Municipal Corporations—Indebtedness—Constitutional Restrictions.**—A city of the third class, with a population of less than fifteen thousand persons, is not authorized to incur an indebtedness in excess of five per centum of the assessed value of its taxable property, unless at the time of the adoption of the Constitution, it then had an indebtedness in excess of five per centum of its taxable property, in which event, it may incur an additional indebtedness, not in excess of two per centum of the value of its taxable property, to be estimated by the assessment immediately preceding the last assessment before the incurring of the indebtedness.
2. **Municipal Corporations—Indebtedness—Constitutional Restrictions.**—If at the time of the adoption of the Constitution a city of the third class, having a population of less than fifteen thousand persons, has an indebtedness in excess of five per centum of the value of its taxable property, and such indebtedness is thereafter reduced to a sum less than five per centum of the value of its taxable property, it can not thereafter incur indebtedness, including that existing, in excess of five per centum of the taxable property.
3. **Municipal Corporations—Issual of Bonds—Pleading.**—An ordinance by the commissioners of a city of the third class, providing for the issual of bonds of the city, and the levy of a tax to pay the interest thereon, and to liquidate the principal when due, is presumed to be a valid exercise of its powers within the constitutional limitations, and one, who attacks the ordinance upon the grounds of unconstitutionality, must set out in his pleading,

the facts, which demonstrate the invalidity, or else fail in his action.

A. J. CARROLL for appellant.

T. G. ANDERSON for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HUET—
Affirming.

It is alleged in the petition, and admitted by the demurrer, thereto, to be true, that Middlesboro is a city of the third class, with a population of less than 15,000. At the time of the bringing of this action, its indebtedness consisted of \$12,000.00, face value, in six per cent bonds, issued for school purposes, which were dated July 1, 1906, and mature July 1, 1926; \$18,000.00, face value, six per cent bonds issued for school purposes which were dated July 1, 1911, and mature on July 1, 1931; \$28,800.00, face value, of refunding bonds which were dated on September 1, 1908, and due September 1, 1928; and \$150,000.00, face value, of refunding bonds, dated October 1, 1920, and maturing serially every five years from 1925 to 1950. The existing indebtedness thus amounts, in the aggregate, to \$208,800.00. The city owes no floating indebtedness.

Of the foregoing indebtedness, the item of \$150,000.00 in bonds, are bonds given to refund other bonds in the same amount, which were issued and sold by the authority of laws existing before the adoption of the Constitution, and to refund indebtedness incurred before that time, and that indebtedness has continuously existed since its incurrence to the present time.

The value of all the property within the city, as assessed for taxation for the year 1918, was the sum of \$2,013,460.00; for the year 1919, \$2,210,435.00; and for the year 1920, the sum of \$3,250,000.00. The latter assessment of property, subject to taxation was the greatest, in value in any year since 1893, and from the best evidence obtainable from the records, and other sources, since and including the year 1892.

It is, also, averred, that at the time of the adoption of the Constitution, and for the years 1891, 1892 and 1893, the city owed a floating indebtedness, the exact amount of which can not be certainly stated, but which from the best evidence obtainable from the records and other available sources of information, amounted, at

the time of the adoption of the Constitution, to something in excess of \$80,000.00, and this sum continued an existing indebtedness until the year 1896, when it was reduced to \$60,000.00, and at that time the city issued bonds therefor, and in 1908 the bonds were reduced by payment to the present sum of \$28,800.00, and this sum remains due and unpaid. Thus assuming the correctness of the averments, that the floating indebtedness of the city was \$80,000.00, at the adoption of the Constitution, the aggregate sum of its indebtedness at that time was \$230,000.00, and of that indebtedness the sum of \$178,800.00 has continuously existed since that time, and yet remains unpaid.

It is, also, averred that the exact amount of the value of the taxable property assessed for taxation for the years 1890, 1891, 1892 and 1893 can not be certainly given, but from the best evidence obtainable from the records of the city and from other sources of information, the value of the taxable property in the city, assessed for taxation, for the years 1890 and 1891, was for each year \$4,000,000.00, and for the year 1892 it was \$3,009,500.00, and for the year 1893 it was a less sum than the assessment for the year 1920. The reason given for the inability of the pleader to state with certainty the amount of the floating indebtedness existing against the city at the time of the adoption of the Constitution, in the year 1891, and for the years 1892 and 1893, as well as the aggregate value of the taxable property, assessed for taxation in the city for each of those years, is that certain records of the city are lost or mislaid, and the imperfect manner in which others of them were kept, but the averment is made that from the best evidence obtainable, the floating indebtedness of the city, for the years 1891, 1892 and 1893, and at the adoption of the Constitution, and the value of the property, as assessed, for the years 1890, 1891, 1892 and 1893 was in accordance with the amounts given.

On November 4, 1919, the city did not owe any floating indebtedness; and on that date it had in its sinking fund for the liquidation of the \$30,000.00 of bonds, which were issued in aid of its schools, the sum of \$17,000.00, and this sum, at the bringing of this action, had increased and amounted to the sum of \$19,000.00.

In the year 1919, it became desirable to provide the municipality with certain public improvements, the cost

of which, together with the existing indebtedness, could not be satisfied with the income and revenue of the city, provided for the year in which the proposed additional indebtedness, necessary to make the improvements, would be incurred, and to provide for such costs, the mayor and commissioners of the city duly enacted an ordinance, providing for an election to be held in the city on the regular election day, November 4, 1919, at which time the question of whether or not the city should be authorized to incur an additional indebtedness, and within the limitations prescribed by the Constitution, but not to be in excess of \$50,000.00, for the purpose of paying the costs of the improvements, and for that purpose to issue and sell the bonds of the city in the amount authorized by law, to become due within forty years, and thereafter to levy a tax to pay the interest thereon and to provide a sinking fund to pay the principal when due, was submitted to the voters of the city. At the election, more than $\frac{2}{3}$ of those voting, gave their assent to incurring the additional indebtedness and to the issue and sale of the bonds of the municipality therefor. Since, the mayor and commissioners have enacted an ordinance providing for the incurrence of the additional indebtedness by the city, in the sum of \$30,000.00, under the authority granted by $\frac{2}{3}$ of the voters at the election, by the issue and sale of the bonds of the city, in the amount stated, and providing for the levy of a tax to pay the interest on same and to create a sinking fund to liquidate the principal of the bonds at maturity.

This action was instituted by the appellant, as a citizen and taxpayer of the municipality to enjoin the city from incurring the indebtedness and its officers from issuing and selling the bonds, and to have the bonds adjudged to be void. A general demurrer to the petition having been sustained, the appellant declined to further plead and his petition having been dismissed, he has appealed from the judgment.

The appeal is rested upon three grounds, on account of which it is contended that the judgment is erroneous.

First. The proposed indebtedness, added to that existing, makes a sum in excess of the indebtedness, which may be incurred by such a municipality, under the provisions of section 158 of the Constitution, and is in violation of section 157 thereof.

Second. The question submitted to the electors at the election did not state the amount of the indebtedness to which they were assenting, and for that reason the election was invalid.

Third. The ordinance providing for the submission of the question of the issuance of the bonds to the voters, did not limit the purpose of the indebtedness to a single purpose or object, but provided that the indebtedness would be incurred and the bonds issued to provide money for building bridges, sewers, for lights, public ways, and other public improvements.

The incurrence of the proposed indebtedness being assented to by more than $\frac{2}{3}$ of the qualified voters of the municipality, voting upon the proposition at the election, and \$30,000.00 of the present indebtedness having been incurred for school purposes, and at least \$150,000.00 of it having been incurred before the adoption of the Constitution, the only question for decision, arising under sections 157 and 158 of the Constitution, is whether the city is authorized, under the latter section, to incur an additional indebtedness, that already existing being in excess of five per centum of the value of the taxable property of the city, estimated by the assessment, "next before the last assessment, previous to the incurring of the indebtedness." Section 158, *supra*, is as follows: "The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment, next before the last assessment previous to the incurring of the indebtedness, viz.: Cities of the first and second classes and of the third class having a population exceeding 15,000, ten per centum; cities of the third class having a population of less than 15,000 and cities and towns of the fourth class, 5 per centum; cities and towns of the fifth and sixth classes, three per centum; and counties, taxing districts and other municipalities, two per centum; provided any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations, when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public

improvement, undertaken and not completed and paid for at the time of the adoption of this Constitution, and, provided further, if at the time of the adoption of this Constitution the aggregate indebtedness bonded or floating, of any city, town, county, taxing district, or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding two per centum, and no such county, taxing district or other municipality, in an amount exceeding one per centum, in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency, the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality."

It will be observed that this section of the Constitution provides, that a city of the third class with a population of less than 15,000 persons, can not incur an indebtedness, which including existing indebtedness in the aggregate, is in excess of five per centum of the value of the taxable property of the city, estimated by the assessment of the property for taxation, "next before the last assessment previous to the incurring of the indebtedness," unless at the time of the adoption of the Constitution the indebtedness of the city, bonded or floating, including that which it has been or may be authorized to contract as provided in section 158 exceeded five per centum of the assessed value of the taxable property, in which event the city may contract an additional indebtedness to the extent of two per centum of the assessed value of the taxable property estimated as heretofore stated. It will, also, be observed, that, if at the time of the adoption of the Constitution, the indebtedness exceeded five per centum of the value of the taxable property, and thereafter, the indebtedness is reduced to less than five per centum of the assessed value of the property, it cannot thereafter be allowed to exceed five per centum of the value of the property. It is readily apparent that the existing indebtedness of the city—\$208,000.00—is in excess of five per centum of the

assessed value of the taxable property for either the year 1918 or 1919, whichever may be adopted as the assessment by which the estimate is to be made, and hence, if the proposed indebtedness may be incurred, it must appear, that the indebtedness, existing at the adoption of the Constitution, was in excess of five per centum of the value of the taxable property, and that such indebtedness has continued and maintained such excess, continuously since that time, and if so, an additional indebtedness equal to two per centum of the value of the taxable property may be incurred, under the provisions of the section of the Constitution, *supra*. This construction of the section of the Constitution, *supra*, is manifestly correct, because it mandatorily provides, that such a municipality can not add to its indebtedness, so that the aggregate thereof is in excess of five per centum of the value of its taxable property, if at the adoption of the Constitution its debts were less in the aggregate than that per centum of the assessed value of the property; and although at the adoption of the Constitution, the indebtedness was in excess of five per centum of the assessed value of the taxable property, if it should thereafter be reduced below that per centum, it can not thereafter be increased in excess thereof. Hence, if the appellant claiming that the incurrence of the proposed indebtedness is void, because in violation of section 158 of the Constitution, should show, that the indebtedness of the city was at any time, since the adoption of the Constitution, less in the aggregate than five per centum of the value of its taxable property, estimated as required by the Constitution, it would be fatal to the incurrence of the proposed indebtedness. Assuming that the assessed value of the property for the year 1891, at the adoption of the Constitution, was \$4,000,000.00, and for each year thereafter, up to and including the year 1919, was not in excess of \$3,250,000, and that the bonded indebtedness at the adoption of the Constitution was \$150,000.00, and the floating indebtedness was \$80,000.00 and the latter item of indebtedness so existed until 1896, when it was refunded in bonds to the amount of \$60,000.00, and \$28,000.00 of the latter sum has existed during every year since 1896, a calculation demonstrates that the indebtedness, at the adoption of the Constitution, exceeded five per centum of the assessed value of the taxable property for the year in which the Constitu-

tion was adopted, and the indebtedness then existing and continuing until the present time, has exceeded five per centum of the value of the taxable property for each year since the Constitution was adopted, and hence the municipality is authorized to incur additional indebtedness not exceeding two per centum of the value of the taxable property estimated by the assessment made next before the last assessment previous to the incurring of the indebtedness. It is, however, not overlooked, that it is averred in the petition that on account of loss and mislaying of records, the value of the property assessed for taxation for the years 1891, 1892 and 1893 can not be stated with certainty, nor can the amount of the floating indebtedness existing at the adoption of the Constitution in 1891, and during the years 1892 and 1893 be stated with certainty; but in as much as it is averred that in the absence of certain records, other sources of information were available, and have been relied upon, and that the sums stated are approximately correct, the pleading must be construed, when stating the value of the assessed property for those years as well as the then prevailing indebtedness, as giving substantially the correct sums. If this view should not be correct, the result would be the same as to the appellant. It will be presumed that the board of commissioners, when adopting the ordinance for the issual and sale of the bonds, and the imposition of the tax levy to pay their interest and to create a sinking fund to liquidate the principal at maturity, did not exceed its authority, and was acting within the constitutional rights of such a municipality, and one who attacks the ordinance upon the ground that it exceeds the constitutional limitations, must set out in his pleadings the facts which demonstrate the invalidity of the proceeding upon the alleged constitutional grounds. *Southern Bitulithic Co. v. De Treville, et al.*, 156 Ky. 513; *Morris v. Hoagland*, 116 S. W. 687; *Louisville v. Gosnell*, 22 R. 1524; *Frankfort v. Morgan*, 33 R. 297; *O'Bryan v. Owensboro*, 24 K. L. R. 469. Hence, if appellant failed to aver the facts necessary to show the constitutional invalidity of the proceeding to create the indebtedness, the demurrer to his petition was properly sustained.

(b) To determine whether the proposed additional indebtedness of \$30,000.00 may be lawfully incurred, it is necessary to determine by which assessment of the

taxable property the estimate of percentage must be made. The constitution provides that the estimation of the percentage must be made "on the value of the taxable property therein to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness." The authority to create the indebtedness was granted as the result of the election held on November 4, 1919, under an ordinance submitting the matter to the qualified voters enacted theretofore. But the ordinance providing for the issual and sale of the bonds was not adopted until in November, 1920, and at the time of the institution of this action, the bonds had not been offered or sold, but the assessment of taxable property for the year 1920 had been completed. If the bonds are never sold nor delivered, no indebtedness can or will be incurred on their account. No contract of any kind will have been entered into that would create an indebtedness until the sale and delivery of the bonds. *City of Louisville v. Parsons*, 150 Ky., 424. Hence, the estimation of the percentage must be made by the assessment of 1919, which was \$2,210,435.00, and two per centum of which is \$44,208.00. The existing indebtedness which has been incurred since the adoption of the Constitution must be deducted from the two per centum of the value of the taxable property, assessed for the year 1919, to ascertain what sum of additional indebtedness may be incurred by the municipality. *Warren v. Newport*, 23 R. 1006; *Holhauzer v. Newport*, 94 Ky. 396; *City of Lexington on appeal*, 96 Ky. 260. This existing indebtedness consists of the \$30,000.00 of bonds for school purposes issued in 1906 and 1911. Before deducting this sum from the two per centum of the value of the taxable property, the \$19,000.00 in the sinking fund for the liquidation of the school bonds, should be deducted from their amount, which leaves the sum of existing indebtedness incurred since the adoption of the Constitution at the sum of \$11,000.00. *Kimberly v. Owensboro*, 176 Ky. 535; *O'Bryan v. Owensboro*, 113 Ky. 680. When the \$11,000.00 of existing indebtedness is deducted from the two per centum of the value of the property for 1919, it leaves a sum in excess of the additional \$30,000.00 of indebtedness proposed to be incurred.

(c) The contention that the question printed upon the ballot at the election, and by which the issue as to the

proposed additional indebtedness was submitted to the voters, did not contain nor state the amount of the bonds proposed to be issued, and hence, did not authorize the creation of a debt, nor the issual of the bonds because presenting an issue so indefinite as to be incapable of intelligent action upon it, is not tenable. The question printed upon the ballot was "Are you in favor of the improvement bond issue?" The ordinance prescribed that this should be the question printed upon the ballot, and which the voter was called upon to answer. The ordinance, also provided that in the event 2/3 of the voters should assent to the bond issue, bonds were to be issued to the extent and in the amount authorized by law not exceeding \$50,000.00, and a tax should be levied to pay the interest and to create a sinking fund to pay the principal. This ordinance was duly advertised by publication in a newspaper of general circulation, in the city on two different days preceding the election, and the voters must have understood that the indebtedness was proposed to be created to the extent and in the amount allowed by the constitutional limitations, and manifestly could not have been misled, nor failed to have understood the extent of debt proposed to be created, and besides, the amount was limited by the ordinance to \$50,000.00. A similar question has recently been decided in *Moore v. Board, etc.*, 189 Ky. 148, and in the older cases of *Arbuckle v. McKinney*, 30 K. L. R. 55; *McGinnis v. Board of Trustees*, 32 K. L. R. 1289. The reasoning and the principles of those cases, we think determine this question adversely to appellant's contention.

(d) The third objection urged to the validity of the proposed bond issue was decided adversely to the contentions of appellant in *Louisville v. Park Commissioners*, 112 Ky. 409. .

The judgment is therefore affirmed.

Rabe v. Chesapeake & Ohio Railway Company, et al.

(Decided January 21, 1921.)

Appeal from Kenton Circuit Court
(Common Law and Equity Division).

1. **Railroads—Actions for Injuries to Licensees.**—A railroad is not liable to a licensee injured by stepping into a hole on the com-

pany's right of way while attempting to go around a train blocking a public crossing. Such person must take the license to so use the company's tracks with its accompanying perils.

2. Railroads—Actions for Injuries to Licensees.—A licensee must take the company's property as he finds it, since the owner is only responsible to him for injuries resulting from wilful acts.

JOHN H. KLETTE and STEPHENS L. BLAKELY for appellant.

GALVIN & GALVIN for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Alleging appellees obstructed Twelfth street, a public way in the city of Covington, for an unreasonable length of time, to-wit, about fifteen minutes, and that in endeavoring to go around the train so blocking said crossing, appellant stepped into a hole on the company's right of way, and was thereby injured, she instituted this action to recover damages for the injuries so sustained. In an amendment filed after a demurrer to the petition had been sustained, it was alleged the accident happened at four o'clock in the afternoon while appellant was on her way to a hospital and that she attempted to go around the train because unable to wait longer. In thus crossing the track appellant says she was using the only possible means of getting across Twelfth street from one side of the right of way to the other, that Twelfth street is a much traveled thoroughfare and was frequently obstructed by appellee's trains, and because of this fact it was customary for the public to pass around the trains as she did on the occasion stated, a fact and custom well known to appellees.

A demurrer to the petition as thus amended was sustained, the petition dismissed and it is to reverse said judgment that the present appeal has been taken.

Treating appellant as a licensee, the inquiry arises, what duty did appellees owe her?

The accident did not occur on the crossing, but to the north thereof, while appellant was attempting to pass behind the train.

Generally speaking, a railroad in the operation of its engine and cars owes to a licensee the duty of giving warning of the approach of its trains, to operate same at a reasonable rate of speed and to maintain a lookout. This should be the full extent of its duty to a licensee.

The company is not required to safeguard every place of possible danger on its right of way. The licensee must take the property as he finds it, since the owner is only liable to a licensee for injuries resulting from wilful acts. *Bales v. L. & N. R. R. Co.*, 179 Ky. 207, 200 S. W. 471.

There is quite a difference between the company's positive and affirmative acts in the operation of its trains, and the mere passive or negative acts growing out of the failure to protect a licensee from defects on its premises. This is well illustrated by the opinion in *L. & N. R. R. Co. v. Hobbs*, 155 Ky. 130, 159 S. W. 682, 47 L. R. A. (N. S.) 1149, wherein a directed verdict was held proper under facts similar to those presented by this record. In that case the court said:

"The licensor who has on his premises a stationary object (turntable) that might inflict injury upon a careless or inattentive licensee who came in contact with it, or who had on his premises an excavation or pit used in connection with his business, into which a thoughtless licensee might fall, is not to be held to the same degree of care or burdened with the same duty as the licensor who uses in his business a dangerous movable agency like an engine or cars, the immediate presence of which the licensee cannot many times know of in the absence of notice or warning, and it is well that a distinction should be made in the particular named between the duty and liability of a railroad company in the movement of its trains to licensees and its duty toward them in other respects not connected with the operation of its trains or any other movable agency."

Plaintiff, who attempted to cross a railroad platform for his own convenience as a short cut from one street to another, was held in *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520, to be a mere licensee and not entitled to recover for an injury received by falling into a hole in such platform, although the railroad had passively permitted the plaintiff and the public generally to so use it.

As said in *Pollock on Torts*, section 426:

"In the language of continental jurisprudence there is no question of *culpa* between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of *dolus* will make the licensor liable."

The above text is approved in *Elliott on Railroads*, wherein the author (sec. 1250) says the licensee takes his license subject to its concomitant perils. In this same connection, see *Indian Refining Co. v. Mobley*, 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497.

From the foregoing it follows that appellant has not shown herself entitled to recover. She was compelled to take the premises as she found them. As to her, appellees were under no obligation to keep their right of way in a suitable condition for the use she sought to make of it at the time of her injury.

That the blocking of the crossing necessitated the use of the tracks at another point will not avail her. It was so held in *Jones v. Illinois Central R. R. Co.*, 31 R. 825, 104 S. W. 258, 13 L. R. A. (N. S.) 1066, where a recovery was denied one injured while attempting to cross under a train standing on a crossing, though said crossing was in general use by the public, was frequently blocked and persons using it often found it necessary in crossing to go through or under the cars. To same effect is *Southern Railway in Ky. v. Clark*, 32 R. 69, 105 S. W. 384, 13 L. R. A. (N. S.) 1071.

The lower court did not err in sustaining the demurrer to the petition as amended.

The judgment is affirmed.

Grubbs, Ex'r, et al. v. Grubbs, Ex'r, et al.

(Decided January 21, 1921.)

Appeal from Allen Circuit Court.

1. **Wills—Remainders.**—A devise of land to the son of testatrix created in him a vested estate in remainder notwithstanding a provision in the will that the devisee should care for and maintain his parents during their lifetime, there being no devise or limitation over in the event of failure on the son's part to make the requisite provision.
2. **Wills—Remainders.**—In cases of doubt it will be presumed that testatrix intended to devise an absolute rather than a qualified estate and since the law favors the vesting of estates, no remainder will be construed as contingent which may, consistently with the intention of testatrix, be deemed vested.
3. **Wills—Failure to Perform Condition.**—Where there is no devise or limitation over to take effect upon the failure of performance

of an annexed condition the failure to perform the condition, though precedent, will not work a forfeiture of the devise, such condition being construed to be a subsequent condition.

BRADBURN & HARLEN and OLIVER & DIXON for appellants.

SIMS, RODES & SIMS and NOEL F. HARPER for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

Elizabeth Grubbs died testate in 1906. To her husband she made an absolute gift of her personalty and also a life estate in her real estate. The will contains these further provisions:

"Fourth, at the death of my said husband, should I survive *him*, I give to my son, W. C. Grubbs one-half of all my real estate the same to commence (then follows description) and I also will my son W. C. Grubbs one-half interest in wood land bought from the Grider heirs.

"Fifth, provided that my son W. C. Grubbs, shall live with me and my husband, John W. Grubbs, during our lives and shall take care and provide means of support for us during our lives.

"Sixth, I will and bequeath to my other children not mentioned the remainder of my real estate provided they shall pay or cause to be paid the remainder of a \$200.00 note owing by my husband to Fanny M. Watts and that they pay to John L. Grubbs the sum of \$100.00 and in case they should fail or refuse to pay the afore-said sums, then, I will and bequeath to my son W. C. Grubbs the whole of my real estate."

John W. Grubbs, husband of testatrix, nominated as executor of said will, duly qualified and is still acting as such.

W. C. Grubbs died in 1919 having devised his estate to his brother, John L. Grubbs, who was named executor of his will and to whom was committed the trust imposed on W. C. Grubbs under the provisions of his mother's will.

The petition sought a construction of the will of Elizabeth Grubbs, the question for our decision being the character of the estate devised to W. C. Grubbs.

In the opinion of the chancellor, the fifth item of the will of Elizabeth Grubbs created a condition precedent to the taking of any interest in decedent's estate on the part of W. C. Grubbs under the fourth item, and said

condition not having been fulfilled and being impossible of fulfillment on account of the death of W. C. Grubbs, testatrix died intestate as to that portion of her real estate mentioned in the fourth item.

It is contended by appellant, plaintiff below, that by the fourth item, W. C. Grubbs took a vested estate in remainder in the land mentioned and this is the view we take of the matter.

"Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent." 2 Bl. Com. 168.

As said in Fearné on Remainders, 216:

"The present capacity of taking effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

The law favors vested estates and no remainder will be construed as contingent which may, consistently with the intention of testatrix, be deemed vested. 4 Kent Com. 203.

In cases of doubt as to the quantity of the estate devised, and whether vested or contingent, the general rule is that the creator of the estate intended it as an absolute rather than a qualified estate.

Here we have the certain event (the husband's death), an ascertained person and the present capacity of taking effect in possession immediately on the determination of the precedent estate, hence it would seem the clause in question contains those elements necessary to create a vested remainder.

In the sixth item it is provided that in the event the children other than W. C. Grubbs, failed or refused to pay the \$300.00 mentioned in said item, the entire estate would go to W. C. Grubbs. Not only is this language indicative of a prior, absolute devise of one-half of the real estate free of any conditions other than the life interest of the husband, but the devise over, upon the failure to pay the stated indebtedness, leads to the conclusion that testatrix had no such limitation or condition in mind in the devise to her son, W. C. Grubbs,

found in the fourth item. When there is no devise or limitation over to take effect upon the failure of performance of an annexed condition the failure to perform the condition though precedent does not work a forfeiture of the devise, such condition being construed to be a subsequent condition. *Pearcy, etc. v. Greenwell, etc.*, 80 Ky. 616; *Bryant's Admr. v. Dungan*, 92 Ky. 627, 18 S. W. 636, 37 Am. St. Rep. 618; *Low v. Ramsy, etc.*, 135 Ky. 333, 122 S. W. 167, 135 Am. St. Rep. 459. As an illustration of this principle, *Irvine v. Irvine*, 12 R. 827, 15 S. W. 511, may be cited. In the will under construction in that case it was provided that upon the failure of testator's son to care for his mother the latter was given absolute power to dispose of property which the son would have received had he complied with the conditions in the will. These provisions were held to be conditions precedent to the vesting of the estate in the son.

In the instant case there is no disposition of the estate in the event of W. C. Grubbs' failure to make the proper provision for his parents, from which it seems impossible, the other parts of the will considered, to escape the conclusion that W. C. Grubbs took a vested estate in remainder in the land mentioned, subject however to a charge or lien for the value of the care and maintenance contemplated, to the extent that he failed to so provide for either or both of his parents.

In 40 Cyc. 1711, the text reads:

"Gifts conditioned on the beneficiary's rendering service or furnishing support and maintenance to another are valid and are ordinarily construed as dependent on a condition subsequent, unless the plain intent of the testator is to make the service or support a condition precedent."

Having received a vested remainder in the described land, W. C. Grubbs had the right to dispose of same by will subject to the intervening life estate of his father, J. W. Grubbs

For the reasons given the judgment will be reversed for further proceedings not inconsistent herewith.

Wallace v. Cook.

(Decided January 21, 1921.)

Appeal from Garrard Circuit Court.

1. **Contracts—Alteration.**—A written contract may be altered, modified or even substituted by a subsequent oral one in all cases where the law does not require the contract to be in writing; but for the oral alteration or modification to be effective it must be supported by a legal consideration which need not be the payment of money or delivery of property, but it may be anything which is of benefit to the promisor or detriment to the promise. And, "benefit" in this connection means that the promisor has in return for his promise acquired some legal right to which he would not otherwise have been entitled; while the word "detriment" as so used means that the promisee has in return for the promise forborne some legal right which he otherwise would have been entitled to exercise.
2. **Contracts—Failure of Consideration.**—In the absence of the payment of money or the delivery of property, or an agreement to do so, and in the absence of some such *benefit* or *detriment* as above defined there is a failure of consideration and no legal rights accrue to the parties.
3. **Contracts—Construction—Intention of Parties.**—In the interpretation of contracts courts are chiefly concerned as to the intention of the parties as expressed by the terms they employ, which is always to be administered if it can be ascertained from the entire contract.
4. **Contracts—Intention of Parties.**—In arriving at the intention of the parties words may be discarded as surplusage when necessary to effectuate the intention, and if a contract is equally susceptible to two constructions, the one being equitable and just to the parties, while the other is oppressive and inequitable to one of them and places him at the mercy of the other, the more equitable interpretation will be adopted; likewise in such cases if necessary to reconcile the ambiguity and to administer the intention of the parties it will be construed more strictly against the one who prepared and printed it and who employed the words in which it is expressed.
5. **Contracts—Construction.**—In case of an irreconcilable conflict between written words and figures in a contract the figures will surrender to the written words and the latter will prevail.
6. **Contracts—Construction.**—Where a written contract with a real estate agent for the sale of land provided that he should have until "60 days" in which to sell it and then provided that the sale should be at auction and held not later than a stipulated day which was far short of the "60 days:" Held, that the term "60 days" should be discarded, since it was plainly the intention of the parties to provide for only one sale, which was at "auction"

and which was to occur on or before the day fixed in the contract for it.

LEWIS L. WALKER for appellant.

J. E. ROBINSON for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

On August 30, 1919, appellee and defendant below, W. R. Cook, signed and delivered to appellant and plaintiff below, Oliver T. Wallace, a written contract authorizing the latter to sell the farm of the former situated in Garrard county and containing about 500 acres. The contract is in the nature of a letter addressed to plaintiff at his home in Wilmington, North Carolina. It is on a printed form with blanks filled with pencil writing and interlineations and erasures made in the same way. In its completed form, omitting address and signature, it reads:

“Being desirous of selling my land, same being below described, to-wit: About 500 acres on old Danville pike near Lancaster, Ky., I hereby place in your hands, exclusively, until 60 days with the understanding that you are to offer same for sale at auction, within before the 15th of September, days from this date: you to do such advertising as you may deem necessary, in the way of prizes, newspapers, handbills, circular letters, posters, etc., to furnish advance man, auctioneer, and ground man to show prospective bidders the strong points of the lots or tracts and endeavor to induce them to bid on same.

“You agree to do the necessary surveying, cleaning, staking and diagraming, and to lend co-operation in making the sale a success. You are to furnish a man to superintend the developing of the property without any cost to me for said superintendence, and are to determine the size, number and character of the lots or tracts. Whenever a map or drawing is submitted showing the layout of the property I agree to place a minimum price on each lot or tract, the total minimum prices to aggregate \$250.00 per acre. You are to sell the property subject to confirmation, and I agree to confirm the sales on the following basis: Any tract that brings the minimum price or above.

"On date of sale, I agree to pay you $\frac{1}{3}$ of all over minimum price any tract brings of the gross receipts arising from the sale, out of which you pay all your expenses. I will make the following terms to purchaserscash, the balance in.....years from date of sale, with interest on the deferred payments at the rate of.....% per annum, and will allow a I agree to take at face value all notes and mortgages arising from the sale. Seeding privileges fall 1919. Purchasers pay 1920 taxes. It is understood that I will have no by-bidders at this sale. This is the only agreement existing between the parties hereto relative to the sale of this land."

On the back of the contract defendant wrote and signed this stipulation: "I agree that the minimum amount to be received by you in event of no sale shall be \$250.00." Among the written insertions in the printed form are the expressions "60 days" and, "before the 15th of Sept." In the printed form of the contract it is stated that plaintiff might sell "privately or at auction" but the words "privately or" are stricken out with a pencil mark through them so as to make the contract provide for only a "sale at auction" and it must be "before the 15th of Sept." After the execution of the contract plaintiff fixed his auction sale for September 12, 1919, and pursuant to the right conferred upon him in the contract he divided the entire tract into seven separate parcels or lots and caused a plat to be made showing the various subdivisions, together with the number of acres in each, and after this was done and before the sale, defendant placed a minimum price per acre on each of the seven lots or subdivisions of his farm so as to make an average minimum price of its entire acreage, the sum of \$250.00 per acre as stipulated in the contract. The minimum price of lots numbers 1, 2, 3 and 4 was \$275.00 per acre and on lots numbers 5, 6 and 7, \$210.00 per acre. Lot number 3 contained the residence of defendant and upon the adjoining lot number 2 was located a barn and other outbuildings on the farm. Lot number 1 on the day of the sale was offered first and it sold for \$285.00 per acre and then lot number 3, upon which was located the dwelling, was offered and it sold for \$277.50 per acre. No bid for either of the other lots amounted to a sum equal to the minimum price fixed thereon by defendant; but he in

the exercise of what he claimed to be his right under the contract accepted and confirmed the highest bids offered for the last five lots, notwithstanding they were under the minimum price, and the aggregate thereof plus the more than the minimum price offered on lots numbers 1 and 3 equalled a total sum of \$119,097.40, for the whole farm, which was an average of \$238.12 instead of \$250.00 per acre. After the sale a dispute arose between the parties over the amount due plaintiff as commission for his services under the contract; the defendant claiming that he was entitled to only the sum of \$280.91 (being $\frac{1}{3}$ of the excess above the minimum price of \$275.00 which lots numbers 1 and 3 sold for and which $\frac{1}{3}$ of such excess exceeded \$250.00), while plaintiff insisted that he was entitled to 3% of the gross amount of the sales of all the lots (\$119,097.40), which per centum amounted to \$3,572.92, and he brought this suit against defendant to recover the latter sum.

In his petition he alleged that on the day of the sale and before it was commenced or before it was completed (it does not appear which) he and defendant entered into an oral agreement to the effect that if defendant should confirm and accept the sale of any lot or lots for which the highest bid was less than the minimum price fixed thereon, then and in that event, plaintiff was to receive 3% of the entire amount of the sales in lieu of "all over minimum price any tract brings" as stipulated in the written contract. A demurrer was sustained to the petition and plaintiff filed two amendments, the substance of which was that when the writing was executed defendant stated that he did not intend to confirm or accept any sale below the minimum price which he might fix on any tract or lot, and that on the day of sale he notified plaintiff that he had changed his mind and he intended to exercise what he claimed to be his right under the contract to accept any bid which he saw proper whether it equalled or exceeded the minimum fixed price or not, and that thereupon the oral contract sued on was entered into. A demurrer filed to the petition as thus amended was likewise sustained and the court gave judgment for the sum of \$280.91, the amount to which plaintiff was entitled under the written contract, and dismissed his petition in so far as it sought a recovery for any other sum, and to reverse that judgment plaintiff appeals.

There can be no doubt of the legal proposition that it is competent for parties to vary, alter or modify a prior written contract by a subsequent oral agreement in all cases where the contract is not one required by law to be in writing. This is a fundamental doctrine with reference to contracts. *John King Co. v. L. & N. R. R. Co.*, 131 Ky. 46; *Shadwick v. Smith*, 147 Ky. 159, and *Murray v. Boyd*, 165 Ky. 625. But, it is equally true (a proposition sustained by all the authorities as well as by the reason and logic of the law) that the orally substituted contract, or the oral modification, must conform to the principles of the law relating to the execution of valid and enforceable contracts, i. e., such oral agreements must be supported by a valid consideration, otherwise no rights accrue thereunder. It was the absence of a consideration to support the oral contract sued on, as held by the trial court, that induced him to sustain the demurrers to plaintiff's pleading and to dismiss his suit. The only question then in the case is whether there was a valid consideration for the oral contract sued on.

It is a fundamental principle, with which even the law student is familiar, that a consideration sufficient to uphold a contract need not be the payment of money, or the delivery of property, since it is sufficient if the thing agreed to is "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." 13 *Corpus Juris*, and *Van Winkle v. King*, 145 Ky. 691. By the word "benefit" in this definition is meant "that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled," and by the word "detriment" in the definition is meant, "that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise." *Corpus Juris*, *supra*, 311-312, and pages 315-316 and numerous cases cited in note 90. As a corollary to the above definition of a valid consideration for a contract it is held by the courts and stated by text writers that: "A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise to perform, an existing legal obligation is not a valid consideration." 13 *Corpus Juris*

351. See also as sustaining the quotation *McDevitt v. Stokes*, 174 Ky. 515; *Tudor v. Security Trust Co.*, 163 Ky. 514; *Eblin v. Miller*, 78 Ky. 371, and 9 Cyc., pages 312, 316 and 347.

In the light of these well settled principles of the law relating to contracts our task is to determine whether there was a valid consideration for the oral contract which plaintiff attempts to enforce. As we understand his counsel the principal, if not the only, contention made in brief is that the written contract gave plaintiff the exclusive right for 60 days after August 30, 1919, to sell defendant's farm, and that in as much as a sale was made by defendant on September 12 thereafter, through his confirmation of the offered bids *under* the minimum price fixed by him, the exclusive right of plaintiff to sell the farm until that date was surrendered which, it is contended, furnished a sufficient consideration for the oral agreement. If plaintiff's counsel is correct in his interpretation of the written contract there can be no doubt of the correctness of his conclusion; so that it becomes necessary to construe the written contract according to the leading and all prevailing rule, i. e., the intention of the parties as gathered from the entire contract. *Siler v. White Star Coal Co.*, 190 Ky. 7. At the outset it is perfectly patent to our minds that there is an irreconcilable conflict between the terms "60 days" and the terms "before the 15th of Sept.," found in the written contract, as measuring the time within which the sale contracted for shall be made. Evidently, as is shown by erasing the printed word "privately" therein, the only sale contemplated by the parties was one "at auction," and even that character of sale must be made "before the 15th of Sept." There can be no escape from the conclusion that such was the intention of the parties, for the contract says so in plain and unambiguous terms. Moreover, that interpretation was the one put upon it by the parties, since there was never any attempt on the part of plaintiff to make a private sale of the property, nor to make a sale at auction except on the day he fixed, viz.: September 12, 1919. He does not allege his intention or purpose to have offered the land for sale after the 12th and before the 15th of September, or at any other time thereafter up to the expiration of the 60 days. But, if he had so alleged it would not aid his cause, since as we have seen, only one

auction sale was contemplated. "Where necessary to effectuate the intention of the parties, a word or phrase may be disregarded" (13 Corpus Juris 535), and "in case of an inconsistency between words and figures in a contract the words govern." Corpus Juris, *supra*, 537; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775, and Romie v. Haag (Mo.), 178 S. W. R. 147.

If the interpretation of the written contract contended for by plaintiff is the true one then it would become possible for him to place defendant in such position as to obtain from the latter a fraudulent and undue advantage, to extricate him from which he would be compelled to submit to almost any terms which plaintiff might see proper to impose. This is seen when it is remembered that plaintiff under the written contract could sell any subdivided tract or lot of plaintiff's farm which he might select, provided he obtained a bid equal to or above the minimum price fixed thereon. Under such right the parcel containing the dwelling could be sold first, or near the first one (as was done in this case) and if the other parcels did not bring the minimum price plaintiff would not only be deprived of his dwelling, but would also have his farm divided because of the sale of the lot upon which his dwelling was located. In that situation, if plaintiff's contention be true, defendant could not accept or confirm the sale of the other lots or make a sale himself thereof until the expiration of the 60 days. With defendant in this dilemma plaintiff was in a condition to obtain a most advantageous alteration of the written contract. Clearly it was not intended by the parties in executing the written contract for defendant to be placed in any such situation. Such construction would render the contract extremely oppressive to defendant and place him largely at the mercy of plaintiff, who, according to his construction, could destroy the unity of defendant's farm with the latter's right to protect himself perhaps dangerously postponed. Courts, when the language employed is capable of a different construction, will not adopt the oppressive one. Elliott on Contracts, section 1521, and 13 Corpus Juris 540. Moreover, we have seen that the original contract was both prepared and printed by plaintiff. Its words are those of his own choosing and the rule is in such cases, if the contract is ambiguous and equally susceptible to two constructions, that one will be adopted which is the

least advantageous to the one who prepared and printed it. Corpus Juris, *supra*, pages 544-545. Applying these various rules we feel quite confident that it was the intention of the parties in the execution of the written contract to stipulate for only one sale of defendant's farm, which was to be *at auction*, and it to occur between the date of the contract and September 15th following, and that defendant agreed therein to confirm all sales at or above the fixed minimum price, leaving him free to reject or confirm all sales for less than that price. In view of this interpretation of the contract what, may we inquire, did defendant obtain through the oral contract more or greater than he was entitled to under the written contract? It bound plaintiff to survey the lots, advertise the sale and carry it out. For that he was to receive the stipulated compensation. Defendant had the right under that contract, as we have seen, to either reject or confirm all bids below the minimum price fixed, but was compelled to confirm all bids at or above that price. The oral contract alleged did not alter the written one in these respects one *particle*. On the other hand, as we have seen, plaintiff in agreeing to the oral contract surrendered and parted with no right which the written contract gave him. As to the oral contract, then, it is clearly a case where there was no "benefit to the party promising (defendant) or loss or detriment to the party to whom the promise was made" (plaintiff). Neither did the promisor (defendant) acquire any legal right by the oral contract to which he was not entitled under the written contract nor was there any forbearance of any legal right by plaintiff which he was entitled to exercise and enjoy under the written contract. Our conclusion therefore is that under the rules, *supra*, for the interpretation of contracts the term "60 days," found therein, should be disregarded, since it was not the intention of the parties for the plaintiff to have that time within which to carry out the one "auction sale" therein provided for, and therefore, plaintiff surrendered nothing as a consideration for the alleged oral contract sued on, nor did defendant receive anything by reason of the oral contract to which he was not entitled under the written one. There is nothing in this court's opinion in the Shadwick case, *supra*, cited and relied on by counsel for plaintiff in conflict with the views above expressed. There the consideration for the oral agreement altering

the written one was the additional efforts on the part of plaintiff to sell the land within the agreed extended time and the benefits which defendant might receive therefrom. It was expressly so held by the court. No such considerations appear in this record and the opinion in that case is not in point.

Having reached this conclusion it necessarily results that there was no consideration for the oral contract and the court properly sustained a demurrer to plaintiff's petition as amended and the judgment dismissing it is affirmed.

Watson v. Watson, et al.

(Decided January 21, 1921.)

Appeal from Pulaski Circuit Court.

1. **Deeds—Mental Capacity—Burden of Proof.**—The law looks with suspicion upon the transfers of property by persons mentally or physically infirm, to those having custody of them, and even when parties in good health sustain a confidential relation to each other, the burden is upon the stronger character, who procured an advantage, to show by clear and convincing evidence that the transaction was freely and voluntarily entered into and devoid of inequitable incidents.
2. **Deeds—Undue Influence—Burden of Proof.**—Where a son, after the death of his father, bought the interests of the other heirs as well as purchased his mother's dower right in the farm and she continued to live with him, being 74 years of age, crippled and afflicted with disease, and being very much disturbed and grieved about the death of her husband, a contract entered into by her with her son while she was on the bed of affliction to support her during the remainder of her life in consideration of \$800.00 cash then paid and all of the property of which she may die the owner, will be set aside at the instance of the proper parties on the ground that the circumstances show undue influence exercised by the son, and an undue advantage obtained by him, which he failed to disprove by clear and convincing evidence under the burden which the law casts upon him under such circumstances.

E. T. WESLEY and J. W. COLYAR for appellant.

W. M. CATRON for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellees and plaintiffs below, J. A. Watson, et al., are three of the surviving children of Savannah Wat-

son, who died intestate on November 19, 1917, a resident of Pulaski county at the age of 74 years; and appellant and defendant below, Joe Watson,, is the fourth and only other surviving child of the decedent. Plaintiffs, after the death of their mother, filed this suit against defendant to cancel a contract which he obtained from her on September 25, 1917, wherein she agreed to pay him the sum of \$800.00 cash at the time, and to convey to him all of her property which she owned at her death, in consideration that he would furnish her "A comfortable home and food with himself and family and all necessary service that she may require for her well being and comfort . . . during the remainder of her natural life, or as long as the party of the first part (the mother) desires to make her home with the party of the second part," who was the defendant. The ground for the relief sought was that the consideration agreed to be paid by the mother was grossly excessive for the services agreed to be rendered by the son; that the mother was unduly influenced by the defendant to execute the contract, and that she was mentally incapacitated at the time to do so, and that defendant took advantage of her age and of her physical and mental condition and coerced her into executing it. The petition prayed that the contract be set aside and held for naught and that defendant be required to account for the \$800.00 paid at the time it was executed, and also the value of the property owned by the decedent at the time of her death, for distribution among the heirs as in case of intestacy. The answer denied the averments of the petition and the court after hearing the evidence upon final submission set aside the contract and granted the relief prayed in the petition, but allowed defendant the sum of \$100.00 for services rendered for the time (less than two months) between the execution of the contract and the death of the mother. Complaining of that judgment defendant appeals and his counsel argues for a reversal only the one question of fact presented by the pleading.

In July preceding the execution of the contract, and prior to the death of Mrs. Watson, her husband died owning a farm in Pulaski county upon which he and his wife had lived for many years and had reared to manhood and womanhood their four children; the husband having other children by a former marriage. De-

fendant appears to have been the youngest of the four children and was married and lived in a separate house upon the farm, which was located but a short distance from the Watson homestead. The mother of plaintiffs and defendant was very much attached to her husband and his death grieved and disturbed her very much. She was also, like most old people, extremely attached to the old home place where she had spent many happy days in association with her husband and with her children, and she wanted to spend the rest of her days therein. Defendant knew these facts, and he also knew that his mother was entitled to dower in the lands of her deceased husband, but notwithstanding that, he seems to have joined with his older half brother, and perhaps others of the heirs, in persuading his mother to sell the homestead, including her dower therein, and he purchased from her and the other heirs all their interest and became the sole owner thereof. It furthermore appears that prior to or about the time of the sale the mother expressed an abiding desire to continue to reside at the old place with defendant, although her other children lived not far away, in the same neighborhood and whom she visited at times, but she made only one such visit after the death of her husband, and upon returning therefrom to the home of defendant she was stricken with some physical ailment (she being already crippled so that she had to use crutches), and this with her advanced age confined her from that time until her death in her son's home, and the most of that time she was confined in bed and was so confined on the day the contract in question was executed when she had to be lifted or propped up in order to sign it. Mrs. Watson from the time of her husband's death drew a pension of \$35.00 per month and her savings from this source, with the amount she received for her dower in the homestead, went to make up the \$800.00 cash which she paid at the time the contract was executed, and at her death she had cash and personal property amounting to between \$500.00 and \$700.00, making a total consideration paid to defendant of between \$1,300.00 and \$1,500.00. It furthermore appears that another contract for the same services was executed by Mrs. Watson about two weeks before the one in contest, both of them being drafted by Dr. Price at the solicitation and request of defendant, which he

made at the home of the doctor and in the absence of Mrs. Watson. In the first contract defendant agreed to render the services for \$800.00 cash to be paid at the time, but Dr. Price, with whom that contract was left, having misplaced or lost it, a second one (being the one in contest) was drafted and Mrs. Watson agreed therein to pay defendant, in addition to the \$800.00 stipulated in the first contract, all of the property which she might own at her death.

Quite an array of witnesses were introduced by both sides to the controversy and there is considerable contrariety, as is usual in such cases, in their testimony. In fact, the testimony of all the witnesses is extremely unsatisfactory, growing largely out of the fact that attorneys for both sides grossly violated the rule against asking leading questions, and indulged in much inquiry about trifling and immaterial matters, overlooking the investigation of material and more vital ones. Sufficient facts appear, however, to convincingly show that Mrs. Watson, especially after her husband's death, was very feeble physically (but it did not appear that she was troublesome to care for) and that she was very forgetful of names of persons and would wander in her conversation, frequently changing the subject in the midst of an unfinished conversation, and in the main the witnesses introduced by plaintiffs testified that from their acquaintance and knowledge of her she was not at and about the time of the execution of the contract mentally capacitated to understandingly execute it. On the other hand some of the witnesses introduced by defendant say that "her mind appeared to be as good as it had been for several years," while others say in substance that if there was anything the matter with her mind they did not discover it. Clearly such evidence is of the weakest character and possesses but little convincing force. If, however, we should put aside entirely the express testimony of the witnesses as to their opinions concerning the mental capacity of Mrs. Watson we are convinced that the undisputed facts and circumstances appearing in the record are amply sufficient to support the judgment appealed from.

It will be observed that the instrument attacked here is not a last will and testament, which requires less mental capacity, and in the execution of which the law tolerates the exercise of more influence on the maker

than is required or permitted in the execution of a contract *inter partes*; and the law is, as has been frequently held by this court, that contracts between those occupying a confidential relation to each other will be closely scrutinized, and the burden is upon him who claims under it to show "by the clearest evidence that the transaction was freely and voluntarily entered into, and devoid of inequitable incidents." *Smith v. Snowden*, 96 Ky. 32. See also *McDowell v. Edwards*, 156 Ky. 475; *Miller v. Taylor*, 165 Ky. 463; *Kelley v. Fields*, 167 Ky. 796, and the numerous cases referred to therein. In the *Snowden* case a conveyance by parents, who were about 70 years of age, to two children who lived with them was set aside and in the course of the opinion the court said:

"In the case under consideration the grantors were old, ignorant and enfeebled by disease; the grantees were vigorous, aggressive and already in charge of the persons and the property of the grantors. We may say in general that when such a relation exists the person obtaining the benefit must show, by the clearest evidence, that the transaction was freely and voluntarily entered into and devoid of inequitable incidents."

In the case of *Bazarth v. Banister*, 143 Ky. 476, referred to in the cases, *supra*, the grantor was the father and the grantee was his son, the two living together, and the grantor was enfeebled with age, and the court held that a confidential relation existed and that "Only slight evidence of undue influence was necessary to authorize the setting aside of a deed on that ground." In the *Taylor* case the court found that the proof of undue influence was slight, but the opinion says that "Under the law which looks with suspicion on death bed transfers it is sufficient to support the finding of the chancellor. He knew the witnesses, and the burden was upon the appellant to show the fairness of the transaction," and under the rule which requires this court not to disturb the finding of the chancellor where the evidence is conflicting, or where there is only a doubt as to the truth of the matter, the judgment cancelling the deed involved was affirmed. Many of the cases referred to from this court will be found to contain facts very analogous to the ones here involved. Indeed, one can hardly read this record without concluding that it was the purpose of the defendant from the beginning to take advantage

of his situation and relation to his mother and of her distressed and enfeebled condition, and to finally possess himself of all her earthly belongings. This purpose was begun by purchasing her dower interest in the homestead, thus depriving her of the legal right to occupy the residence and of carrying out her cherished and frequently expressed desire to continue living there till her death. Defendant was thus in position to dictate to her the terms upon which her wish might be gratified. The dower interest no doubt was sufficient to have supported her during the remainder of her life, which from all external indications, and according to natural laws, must necessarily be short. But if not so, her pension of \$35.00 per month would more than make up any deficit in that regard. He knew of her determined desire to live out the few remaining days of her life on the old homestead, which possessed to her both a sentimental as well as an affectionate value. Having arranged matters so that she no longer had the legal right to occupy the homestead he then began to procure the contract, and first had it drafted in the absence of his mother so as to pay him only \$800.00, which under the circumstances was itself very exorbitant. About two weeks from that time, and while his mother was yet in bed sick, which the appearances indicated would be her last affliction, and perhaps realizing that she would die possessed with still other property, he in the same manner procured a second contract (the one in controversy) altering the consideration so as to include all of his mother's property which she might own at her death. Surely, under the circumstances, the rule, *supra*, concerning transactions between those sustaining confidential relations, would apply in all of its vigor in this case. The burden which that rule casts on the defendant has not been met by him. The \$100.00 which the court allowed him was ample remuneration for the services he rendered and he has no legal ground to complain of the court's judgment, which is in complete accord with the cases, *supra* from this court, as well as following the general principles of equity laid down by the text writers, and it is affirmed.

Smith, et al. v. Massey, et al.

(Decided January 21, 1921.)

Appeal from Livingston Circuit Court.

Fraudulent Conveyances—Preference—Evidence.—In an action by creditors of an insolvent debtor, under section 1910, Ky. Stats., attacking certain alleged preferential sales and transfers by the debtor to certain other creditors, the preponderance of the evidence shows that the defendant creditors did not get any preference over the general creditors, and do not claim any interest in the personal property alleged to have been sold and transferred to them, or the proceeds thereof, and the action was properly dismissed as to them.

C. H. WILSON and J. R. WELLS for appellants.

MONTGOMERY & FERGUSON for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—Affirming.

This is an equitable action by appellants, who were plaintiffs below and who are creditors of William Massey, against said Massey and others, who are also creditors, seeking to have adjudged as fraudulent and preferential certain sales and transfers of personal property and choses in action alleged to have been made by Massey to the defendant creditors, and asking that such sales and transfers be adjudged to operate as an assignment for the benefit of all the creditors of Massey under the provisions of section 1910 of the Kentucky Statutes.

It is conceded that Massey was at the time of the transactions complained of insolvent, and it is apparent that he knew of his insolvency.

In the petition a number of transactions between Massey and his several creditors were assailed, but on this appeal there is involved only the transactions between him and the appellees, J. C., T. L., and Dan Sullivan, J. C. being the father of T. L. and Dan.

The allegations of the petition in substance are that on the 15th of February, 1919, Massey was indebted to each of the Sullivants, and on that day Massey had a public sale of his personal property, at which sale each of the Sullivants bought two or three hundred dollars' worth of personal property, for which they did not pay Massey but the amounts were then, or thereafter, credit-

ed upon what Massey at the time owed them, thereby giving them a preference over the other creditors of Massey.

It was further alleged that after the sale of such personal property, and after good and solvent notes had been executed to Massey by a number of purchasers at the sale, aggregating several hundred dollars, Massey assigned and turned over to the Sullivants such notes, which were credited on Massey's indebtedness to the Sullivants, and which operated as a fraudulent preference to said Sullivants over the other creditors of Massey.

The Sullivants filed separate answers, in each of which it was denied that Massey had turned over to them any notes whatsoever, and in which it was alleged that only two of the Sullivants were at the sale which Massey had, and that those two had, in compliance with the terms of the sale, each executed to Massey his note for the amount of his purchases, payable in twelve months, and had turned over the same to Massey. And these were all the pleadings filed affecting these parties.

Massey, the debtor, testified that the two Sullivants who were purchasers at his sale had never executed to him the two notes for their purchases, but they had agreed to do so; that as to the other notes taken by him from other parties who bought property at his sale, he had put his name on the back of such notes and had left them with T. L. Sullivant, and that he, Massey, immediately thereafter left the state of Kentucky and went to the state of Illinois and was gone about two or three weeks, and that he did not know where those notes were.

The two Sullivants who were at the sale testified that they had bought two or three hundred dollars' worth of property each, and that they had each executed their notes to Massey, payable in twelve months, and each had gone security for the other in such notes, and that they had delivered them to Ed. Massey, the brother of William, and Ed. Massey states that he delivered the two Sullivants' notes to Will Massey.

T. L. Sullivant states that he did not receive the notes or any of them, or any of the proceeds of the sale of the property of Massey, or receive any credit on his debt out of the proceeds of the property, and has no interest in or title to such notes.

The other two Sullivants state, in substance, that they have not and never had any of said notes and claim no interest in or title to them, and never gave Massey credit on his indebtedness to them for such notes, or any proceeds of the said sale.

The lower court adjudged certain transactions between Massey and other creditors than the Sullivants to be preferential and directed such creditors to pay the money into court for the benefit of all the creditors, but as to the Sullivants the petition was dismissed, and the plaintiffs have appealed.

It is difficult to see how the court under this state of the record could have entered any different judgment. The preponderance of the evidence is that neither of the Sullivants has received or claims any interest in the property sold at the sale, or the notes executed therefor, and consequently they have not been preferred over the other creditors.

At the time of the judgment in the lower court the notes executed at the sale had not matured, but it is probable the lower court through its processes has since brought into the action and subjected as far as proper the assets growing out of this sale.

Giving to the finding of fact by the chancellor its proper weight, we see no alternative except to affirm the judgment, and it is so ordered.

Wilcoxson v. Caldwell, et al.

(Decided January 21, 1921.)

Appeal from Marion Circuit Court.

1. Negligence—Fires.—A vendor who has sold and conveyed his property to another, and who remains in possession under an agreement, is liable if he negligently causes a fire which destroys improvements thereon.
2. Negligence—Fires—Actions Between Individuals.—The liberal rules of evidence permitted by the courts in actions against railroad companies for damages caused from fires resulting from the escape of hot cinders, will not be applied in actions between individuals for the negligent causing of a fire in a dwelling house.
3. Negligence—Fires—Vendor Remaining in Possession.—A vendor so remaining in possession of a house by agreement and using the same only in such manner as is customary, and in such way

and for such purposes as it is generally used, is not guilty of negligence and consequently not liable.

4. Negligence—Fires—Burning of Refuse.—The burning in an open grate, in small quantities, of paste board boxes or other refuse customarily destroyed in that way by housewives, is not negligence.

W. H. SPRAGENS, CHAS. C. BALDRICK and H. S. McELROY
for appellant.

BEN SPALDING and W. C. McCHORD for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

In February, 1919, the appellees, C. K. and Mollie Caldwell, husband and wife, sold and conveyed to the appellant a tract of about ten acres of land in Marion county just outside of the city limits of Lebanon, together with the improvements thereon, consisting of a dwelling house alleged to have been worth five thousand dollars, and some outbuildings. Possession was not immediately delivered to appellant but by agreement the vendors were to hold possession and deliver same to appellant on or before the first of April, 1919.

Appellees retained such possession under the agreement, and in the latter days of March began to remove their personal property from the dwelling house and put it into a car at the railroad station about a mile distant, preparatory to shipping it elsewhere. On about the 24th of March there had been removed practically all of the household belongings of the appellees, and C. K. Caldwell had gone to the railroad station with about the last two loads of such household effects, and while he was gone his wife, the appellee, Mollie Caldwell, cleaned up and swept out the whole of said house, containing eight or ten rooms. About an hour after C. K. Caldwell had left a small blaze was discovered on the roof of the two-story house near the central chimney, and the house was destroyed by fire.

This is an action by Wilcoxson against Caldwell and wife in which he alleges that the house destroyed was of the value of five thousand dollars, and that he had insurance thereon for twenty-one hundred dollars, and that the defendants had negligently allowed and caused said house to be set on fire and destroyed while so occupying

same under the agreement, and asks for a judgment against them for twenty-nine hundred dollars.

The defendants answered denying the value to be in excess of twenty-one hundred dollars, and denying any negligence. There was no contrariety of evidence as to the value of the house, it being shown without contradiction that it was worth at least five thousand dollars; so that upon the trial the only issue was as to the negligence of the two Caldwells.

The trial court overruled a motion for a directed verdict for either of the defendants at the conclusion of the plaintiff's evidence, but at the conclusion of the whole evidence directed the jury to return a verdict for both of them, and the plaintiff filed his motion and grounds for a new trial, which were overruled, and he has appealed.

It is apparent that the only question is whether there was such evidence of negligence upon the part of the Caldwells, or either of them, as required the court to submit to the jury the determination of that question.

The whole evidence shows that C. K. Caldwell was absent from the house and at the railroad station a mile away for an hour or more before the first small blaze was discovered on the roof, and it is not claimed that he was guilty of any act or conduct before leaving the house that could have resulted in the fire, all the evidence being directed at showing such negligence upon the part of Mrs. Caldwell.

It was shown that the house had been built about sixteen years, had a shingle roof on it, and that the roof had been on there all that time, but there is nothing to show that it was not at the time a good roof; further, that there were only two chimneys on the two story house, a central, large chimney, with separate flues in it connected with grates and stoves in the rooms, and a kitchen chimney connected only with the kitchen. The fire was discovered at or near the central chimney and was only a small blaze at the time of its discovery.

The plaintiff introduced two witnesses who were at the residence shortly after the discovery of the blaze, Mrs. Abell and J. W. Watkins, who give statements as to what Mrs. Caldwell said about the origin of the fire.

Mrs. Abell says that "She said, 'I don't know how it could have caught. I was upstairs cleaning up and burn-

ing some bandboxes and papers; and unless it caught that way I could not account for it.' "

Mr. Watkins says she said that they were moving out and were cleaning up and burning some papers and she reckoned it caught fire from the papers or something they were burning.

And that is all of the evidence introduced by the plaintiff tending to show negligence upon the part of Mrs. Caldwell.

Mrs. Caldwell stated, in substance, that they were preparing to move out and that practically all of their personal property had been taken from the house, and that she was cleaning the house up, desiring to turn it over to the new occupants in good condition; that there was only one fire in the house and that was in the grate in her family room downstairs, and that there were two small pasteboard boxes in there without any tops; that the fire in her room had gone down and that there was very little of it left, and that she tore up these two small pasteboard boxes in small strips or pieces and put them on the grate fire in small quantities at a time until they were all destroyed; that she remained in the room and watched the fire and that there was not enough fire at any time to go up the chimney; that she had her grip packed ready to leave, and that when she learned the house was on fire took the grip and left the house.

It is argued for appellant that there being no other theory advanced as to the cause of the fire, it must have been caused by the burning in the grate of these boxes and other trash, and whether or not this was negligence under the circumstances and conditions was a question for the jury, and in support of this view reliance is placed upon certain opinions of this court in actions against railroad companies wherein fires had been caused by the escape of sparks from locomotives.

It is apparent that the rules laid down in that class of cases cannot be applied here; the legislature has taken cognizance of the fact that a large number of fires result from cinders escaping from the smokestacks of locomotives and has provided that all smokestacks shall be equipped with a screen or other appliance which will prevent the escape of sparks or cinders therefrom as far as possible, and has imposed a penalty upon the railroad companies for failure to provide their locomotives with such screens or appliances. The act was passed in

recognition of the well known fact that railroad locomotives travel through the country at a high rate of speed, causing a forced draft which forces out hot cinders through the smokestack, thereby endangering houses and other property along the right of way. Therefore the courts, in recognition and enforcement of this legislative policy, have laid down some rules that should not be applied to fires originating in ordinary dwelling houses.

The only question in this case is, whether, admitting as true all the evidence and all fair inferences that may be drawn from it, was Mrs. Caldwell guilty of any negligence, for if she negligently caused the fire which destroyed the house, she is liable. *Kincheloe v. Smith*, 28 R. 1329.

The evidence shows that Mrs. Caldwell did only such things as are customarily done by housewives in destroying waste paper and refuse around their homes; that she used the grate for burning the pasteboard boxes only in such way as they are generally used and for such purposes as they were in part intended. It would be highly unreasonable to say, that by placing any ordinary paper or refuse in small quantities in a grate fire so it might be destroyed, there would be such negligence as would make liable the one so doing it if accident or fire should result. In this case not only is there a total failure to show negligence, but, on the contrary, it is affirmatively shown that she was particularly cautious because she tore up the pasteboard boxes into small pieces and threw only small quantities of them on the fire at one time. This caution was doubtless exercised in view of the intention to vacate the house in a short time and leave it temporarily unoccupied.

It is apparent from the whole evidence that there was no such action or conduct upon the part of either Mr. Caldwell or Mrs. Caldwell different from the acts or conduct of persons when using their own houses and premises for like purposes, and manifestly there was no negligence.

Judgment affirmed.

Louisville Railway Company v. Koob.

(Decided January 25, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Second Division).

1. **Appeal and Error—Street Railroads—Collision of Automobile With Car—Instructions.**—In a suit against a street railroad for personal injuries caused by a collision between a car and the truck in which plaintiff was riding, it was not error to refuse an instruction to the effect that, if the street car was being operated at a reasonable rate of speed, the motorman had a right to presume that the automobile, which was moving along the tracks in front of the car, would continue in the path of safety until some indication was given, either by its movement or by a signal from the driver, that it would leave the path of safety and get into the path of the approaching car, or if the motorman saw the automobile cross the track, he had a right to presume that it would not stop on the track but would pass off the path of the car, since the duty to keep a lookout and use ordinary care to avoid colliding with the automobile truck necessarily carried with it the additional duty of anticipating that the truck might leave the track at any public alley or cross street.
2. **Street Railroads—Collision of Automobile With Car—Trial—Instructions.**—In such a case the court properly refused an instruction telling the jury that if they believed from the evidence that the vehicle in which plaintiff was riding got on to the street car track so close to the front end of the street car, that if the said car was running at a reasonable rate of speed, the motorman under the conditions then and there existing could not by the exercise of ordinary care in the use of the means at his command have perceived the danger to the plaintiff and stopped the car in time to have avoided injury to her, then, notwithstanding that the speed of the car was excessive, the law was for the defendant and the jury should so find, since the case was not one where the collision was caused by the truck's suddenly coming on the track, but by its suddenly stopping on the track, and this defense was presented by another instruction more favorable than defendant was entitled to.
3. **Street Railroads—Collision of Automobile With Car—Personal Injuries—Evidence of Permanent Injuries Question for Jury.**—In a suit against a street railroad for personal injuries, evidence of permanent injuries held sufficient to take the case to the jury.
4. **Damages—Excessive Damages.**—In a suit for personal injuries, a verdict for \$3,800.00 held not excessive.

ALFRED SELLIGMAN and STRAUS, LEE & KRIEGER for appellant.

FRED FORCHT and ELMER C. UNDERWOOD for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

Margaret Koob sued the Louisville Railway Company for personal injuries and recovered a verdict and judgment for \$3,800.00. The company appeals.

According to the evidence for plaintiff, the accident happened under the following circumstances. Plaintiff was employed as a clerk by the Swiss Cleaners & Dyers of Louisville at their office on Fourth street, between Chestnut and Broadway, and was earning \$15.00 a week. Her employer had several automobile delivery trucks which were used in connection with its business. On November 23, 1918, plaintiff asked permission to visit her mother at the St. Mary and Elizabeth Hospital, which is located in the southern part of the city. Permission having been granted, she asked a driver of one of the automobile trucks to take her to the hospital. The place of her employment was on the east side of Fourth street at the first alley south of Chestnut street. At that place she entered the truck and sat on the front seat. The automobile proceeded south on Fourth street in the path of the car tracks. When they reached the first alley north of Broadway, the driver made a turn to go west through this alley to Fifth street for the purpose of avoiding a blockade at Fourth and Broadway, and came to a full stop. After it had been standing on the car tracks for about a minute, the truck was struck by a southbound Fourth street car, running at a speed of about fifteen miles an hour, and was hurled on to the sidewalk into the side of a building, knocking a part of the stone loose from the building and throwing plaintiff into the air as high as the top of the truck, so that she fell upon the street and was injured. Plaintiff's witnesses further say that when the truck stopped, the car was about 200 or 250 feet distant, and the driver held out his hand to indicate that he would change his direction. On the other hand, the evidence for the defendant is that the truck pulled in front of the car and the motorman had to slow down to keep from hitting the truck. As the car and truck moved south on Fourth street, the truck kept gaining on the car. When the truck started to turn into the alley, the driver gave no signal that he intended to do so. When the truck stopped, it was only fifteen or eighteen feet in front of the car. The brake was in good condition and the car could have been stopped within

ten or twelve feet had it not been for the presence of tank car on the track. The motorman did all in his power to stop the car. Although he had not gone far enough to pick up all the current, the full current was on and he was going at a pretty good rate of speed.

Complaint is made of the refusal of the court to give the following instruction:

"The court instructs the jury that if the motorman in charge of the defendant's car was operating the same at a reasonable rate of speed, that if he saw the automobile in which plaintiff was riding proceeding southwardly in a path safe from the approaching car, that said motorman had the right to presume that the said automobile would continue in said path of safety until some indication was given either by its movement, or by a signal from its driver, that said automobile would leave its place of safety and get into a path of danger from the approaching car, or if said motorman saw said automobile cross his track, he had a right to presume it would not stop on the track but would continue on across and pass off the path of the car."

This is not a case where the person injured, or the vehicle containing the person injured, was off the track and in a place of safety and came on the track in front of an approaching car. *Louisville Railway Co. v. Hoskin's Admr.*, 28 R. 124, 88 S. W. 1087; *L. & N. Ry. Co. v. Edelen's Admr.*, 29 R. 1125, 96 S. W. 901; *Ford's Admr. v. Paducah City Railway*, 30 R. 644, 99 S. W. 355. On the contrary, the case is one where the truck carrying plaintiff was in a place of danger as long as it remained on the track, and the duty to keep a lookout and to use ordinary care to avoid colliding with the truck necessarily carried with it the additional duty of anticipating that the truck might leave the track at any public alley or cross street. We therefore conclude that the court did not err in refusing the offered instruction.

Complaint is also made of the refusal of the court to give the following instruction:

"Or if you believe from the evidence that the vehicle in which the plaintiff was riding got on to the street car track so close to the front end of the street car, that if the said car was running at a reasonable rate of speed, the motorman under the condition then and there existing could not by the exercise of ordinary care in the use of the means at his command have perceived the

danger to the plaintiff and stopped the car in time to have avoided injury to her, then notwithstanding that the speed of the car was excessive, if that be a fact, the law is for the defendant and the jury should so find."

The instruction in question does not apply to the facts of the case. The case is not one where the collision was caused by the vehicle's suddenly coming on the track, as the accident did not occur at that time. The defense which defendant's evidence tended to establish is that the truck suddenly stopped upon the track, and this defense is fully presented by a given instruction even more favorable than defendant was entitled to, directing the jury to find for the defendant if they believed from the evidence that the driver of the truck stopped his truck so nearly in front of the car that the motorman, after he saw, or by the exercise of ordinary care could have seen, his position of peril, could not, by the exercise of ordinary care and the use of the means at his command, have stopped the car and avoided the collision.

It is next insisted that the evidence was not sufficient to justify an instruction authorizing a recovery for permanent injuries, and that the verdict of \$3,800.00 is excessive. Plaintiff's evidence shows that she was thrown high into the air and on to the pavement. There was a lump on her head about the size of half a hen egg, her breast was bruised and swollen, one of her ribs was fractured, and there were numerous bruises on different parts of her body. Prior to the accident she had no difficulty in hearing through her left ear, but after the accident her hearing was greatly impaired. She suffered severe pains after the accident and continued to suffer at the time of the trial. Her physician, though admitting that it was possible that the defect in hearing might have been due to a catarrhal condition of the nose, was inclined to the opinion that it was caused by the accident. Another physician removed a tumor from her breast as her breast was then bruised and inflamed, and he was afraid it might result in cancer. About five years before he had noticed the tumor and had recommended that it be taken out then, as it might become malignant if irritated. However, there was no danger of its becoming malignant if not irritated. When the bruised gland was removed, it showed irritation. For the defendant Dr. Kelly testified that he found a chronic catarrhal condition of both ears which was of long standing. This con-

dition was not due to trauma. The only thing that could account for the condition was catarrh. Dr. Sherril testified that he examined both her ear drums and found them normal. There was no anatomical evidence of any injury to her body. Plaintiff's hearing in her left ear was about one-half normal. Deafness could result sometimes from trauma. He found no evidence of a catarrhal condition. It is argued that defendant is not responsible for the operation on plaintiff's breast, since the operation was due to a tumor which should have been removed several years before. However, the evidence shows that the tumor was not malignant, and if the breast had not been bruised and irritated, it might never have been necessary to remove the tumor. Hence, it cannot be said that the defendant was in no wise responsible for the operation, for the accident caused the bruised condition which made the operation necessary. Coming to the question of hearing, the evidence shows that plaintiff's hearing was all right prior to the accident. It cannot be doubted that she received a very severe blow on the head. One physician attributed the loss of hearing to the accident, though he conceded that it might have been caused by catarrh. Another physician was satisfied that catarrh was the sole cause of the defect, while still another physician found no evidence of a catarrhal condition. On the whole, we think there was sufficient evidence of permanent injury to take the case to the jury, and we are unable to say that the verdict is so excessive as to strike us at first blush as being the result of prejudice or passion.

Judgment affirmed.

Whole court sitting.

Hicks v. Wallace.

(Decided January 25, 1921.)

Appeal from Boone Circuit Court.

1. **Fraud—Actionable Fraud—Deceit.**—To constitute actionable fraud it must appear (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made

it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. It is not necessary that the fraudulent misrepresentation be in writing; as in such case the right of action arises out of the fraud and deceit of the defendant, it is not affected by the statute of frauds.

2. **Fraud—Misrepresentation.**—The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished, the means of accomplishing it are immaterial.
3. **Fraud—Misrepresentation.**—The rule requiring investigation by the person to whom a misrepresentation is made, does not apply if any relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other; but in such case the latter is under a duty to make full and truthful disclosure of all material facts, and is liable for fraudulent misrepresentation or concealment.
4. **Appeal and Error—Pleading.**—As in this case the averments of the appellant's petition state a cause of action for fraud, the ruling of the circuit court in sustaining a general demurrer to and dismissing the petition, constitutes reversible error.

JOHN L. RICH for appellant.

N. E. RIDDELL for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Granting appeal and reversing.

This is an appeal prayed from a judgment of the Boone circuit court sustaining a general demurrer to the petition and dismissing an action brought by the appellant, Samuel C. Hicks, wherein he was seeking to recover of the appellee, David B. Wallace, \$303.38, by way of damages, for his alleged loss and deprivation of that amount of money, by and through the fraudulent acts and knowingly false and fraudulent misrepresentations of the appellee.

It appears from the averments of the petition that on November 11, 1911, the appellant, at the solicitation and upon the advice of the appellee, loaned Sophia J. Todd and O. K. Todd, widow and son of J. S. Todd, deceased, \$2,100.00, and to secure the payment of their joint note evidencing this loan, principal and interest, they then duly executed to appellant a mortgage upon a tract of land in Owen county devised them by the will of J. S. Todd. The note and mortgage were delivered to appellant by the mortgagors through appellee and the mort-

gage immediately put to record in the office of the clerk of the Owen county court.

Sophia J. and O. K. Todd by appointment of the will of J. S. Todd duly qualified as the executrix and executor thereof; but before completely settling the testator's estate both died in Owen county, intestate, the death of O. K. Todd occurring first and that of Sophia J. Todd several years later. O. K. Todd was survived by his wife, Ella Todd, and two infant children, Fredrick and Mary Todd. After the death of O. K. Todd, Sophia J. Todd, as the surviving executrix of the will of J. S. Todd, and Ella Todd as administratrix of the estate of O. K. Todd brought suit in the Owen circuit court to obtain a construction of J. S. Todd's will and settle the two estates. The infant children of O. K. Todd and their statutory guardian and certain creditors of the estate of each decedent, including the appellant whose mortgage lien debt remained unpaid, were made parties defendant to the action and called upon to file and assert their several debts. Appellant by answer and cross petition claimed and asserted a lien upon the land for his debt by virtue of the mortgage executed to him by Sophia J. and O. K. Todd to secure its payment, alleged its superiority over all other debts or liens and prayed its enforcement. The infant defendants and their guardian by answer controverted the appellant's mortgage lien, also the lien debts of other creditors, and resisted their enforcement, alleging that Sophia J. and O. K. Todd, by whom these lien debts were created, each took under the will of J. S. Todd, only a life estate in the land thereby devised, and they (the infants) the remainder at their respective deaths; therefore, the liens in question were valid only as against the life estate of each of the mortgagors in the land.

The circuit court by its first judgment rendered in that action only declared its construction of J. S. Todd's will, leaving the rights of the creditors to be subsequently adjusted; and in so doing held that Sophia J. and O. K. Todd jointly took under the will of J. S. Todd the fee in the land devised, thereby excluding the infant children of O. K. Todd from any interest therein under the will.

The infants and their guardian prosecuted an appeal to this court from that judgment, on the hearing of which we held that the will of J. S. Todd did not devise Sophia J. and O. K. Todd the fee in the land of the testator,

but only a joint life estate therein, with remainder to the children of O. K. Todd; hence, the judgment of the circuit court was reversed and the cause remanded for such further proceedings in that court as would not be inconsistent with the opinion of the appellate court. *Todd's Gdn. v. Todd's Admr.*, 155 Ky. 209.

Following its return to the circuit court the case was referred to the master commissioner for a report as to the assets and liabilities of the estates of J. S. and O. K. Todd, which reports, when filed, contained the information required by the order of reference and, as a part thereof, furnished a schedule of the lien debts attempted to be asserted by creditors against the land. After the filing of exceptions to the report by the parties objecting to same, the court in passing on them entered judgment adopting this court's construction of J. S. Todd's will and refusing to enforce the liens of creditors as to certain of the debts that were created by Sophia J. and O. K. Todd after the death of J. S. Todd. Among the liens debts created by Sophia J. and O. K. Todd that were allowed and enforced, however, was that of appellant, and this was done because the money they borrowed of him was applied by them to the payment of the balance due on a debt held by one D. H. Barker, secured by a mortgage on the land, and which was created by the testator, J. S. Todd, two or more years before his death; it being held by the court that by thus discharging the debt of the testator and mortgage lien therefor, the life tenants were entitled to reimbursement from the remaindermen and to a lien on the land for the principal of the Barker debt paid by them; and that being true, the appellant, who furnished them the money to discharge the Barker lien, and took in lieu of the original mortgage a new one which proved defective, was entitled to be subrogated to the lien of the life tenants, therefore the judgment directed a sale of the land for the payment of the principal and interest of his debt and for the payment of certain lien debts in favor of other creditors that were allowed.

An appeal was taken from this judgment by the executrix of the will of J. S. Todd and the infant children of O. K. Todd; and while the opinion of the Court of Appeals deciding this appeal (see *Todd's Ex. v. First Nat. Bank*, 173 Ky. 60), reversed the judgment for other satisfactory reasons appearing therein, it approved and,

in legal effect, affirmed it in so far as it held appellant entitled by subrogation to a superior lien on the Todd land for his debt; and as such lien was again so allowed him by the circuit court in its judgment entered in obedience to the opinion and mandate of this court, his lien debt, amounting to \$2,603.18, principal and interest, was, following the sale of the land and as directed by the judgment, paid him out of its proceeds. \$44.37 of this amount was paid by him in satisfaction of costs taxed against him in the action, and \$259.01 as a fee to an attorney who, by employment of the appellee, D. B. Wallace, represented him both in the circuit court and Court of Appeals in the litigation over his lien debt mentioned, and these sums, aggregating \$303.38, constitute the amount for which appellant sues appellee in the instant case.

It is alleged in the petition that appellant was importuned by the appellee, Wallace, to make the loan of \$2,100.00 to Sophia J. and O. K. Todd and was induced to do so by the assurance and representations of Wallace that the loan would be amply secured by a mortgage lien on the land in question of which he declared Sophia J. and O. K. Todd to be the owners in fee, and that the land was of far greater value than \$2,100.00; that before consenting to make the loan to the Todds, appellant informed appellee he would not do so unless they owned the fee in the land, and he thereupon employed and paid appellee \$5.00 to examine the title and report to him whether it was of that character; and shortly thereafter appellee represented to him that he had examined the title of Sophia J. and O. K. Todd to the land and found them to be the owners in fee thereof; and, in addition, assured appellant that if he would make them the loan, he, appellee, would indemnify or guarantee him against any loss that might result to him from the making of the loan.

It is further alleged in the petition that following this report of appellee upon the title of the Todds to the land, appellant was induced thereby and by the several above specified representations and guaranty of appellee to lend, and did lend, Sophia J. and O. K. Todd \$2,100.00, and accept of them the mortgage on the land as security therefor, but that each and all of the above statements and representations made by appellee as to the Todds owning the fee in the land upon which appel-

lant accepted the mortgage as security for the loan of \$2,100.00, and regarding the value of the land, were false and, in fact, but misrepresentations, which appellee knew to be false when made by him, for he then well knew that Sophia J. and O. K. Todd were not the owners in fee of the land, but only the owners, each of a life estate therein. That the above false statements and misrepresentations of appellee and each of them were fraudulently made by him for the purpose of deceiving and defrauding appellant, to whom their falsity was then unknown, by inducing him to make the loan of \$2,100.00 to Sophia J. and O. K. Todd, in order that he (appellee) might receive of Sophia J. and O. K. Todd the sum of \$100.00, which they, though that fact was then unknown to appellant, had agreed to pay him and did, after borrowing the \$2,100.00 of the latter, pay him as a fee or commission for procuring for them the loan.

It is also alleged in the petition that appellant believed and relied on the above specified false and fraudulent representation of appellee and was induced thereby to make the loan of \$2,100.00 to the Todds, which, but for same, or had he known of the agreement of the latter to pay appellee \$100.00 for procuring for them the loan, he would not have done.

The petition further alleges that when appellant was made a party to the action brought to settle the Todd estates, he called upon appellee to protect his lien debt and to make good the latter's guaranty to save him from loss by reason of his loan to Sophia J. and O. K. Todd, in response to which appellee employed lawyers to represent appellant in that action, but that they collected their fee of him instead of appellee.

The averments of the petition referred to, which are admitted by the appellee's demurrer to be true, seem to present for the appellant a case of actionable fraud, for as said in 20 Cyc. 12:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of the facts must be proved, with

reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. A maxim announced in an early English case and ever since recognized as correct is that fraud without damage or damage without fraud is not actionable, but that where both concur an action of deceit will lie." In the same volume, page 14, it is said:

"The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished the means of accomplishing it are immaterial."

Tested by the rules just stated it cannot be questioned that in the petition are found all the essential elements of actionable fraud enumerated in the excerpt from Cyc., *supra*, and, in addition, averments of fact showing the existence of a confidential relation between appellant and appellee which entitled the former to place peculiar reliance upon the representations of the latter. Regarding the legal effect of such a relation, we find in 20 Cyc. 34, an apt statement of the following rule:

"The rule requiring investigation by the person to whom a misrepresentation is made does not apply if any relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other; but in such cases the latter is under a duty to make full and truthful disclosure of all material facts, and is liable either for fraudulent misrepresentation or concealment. Nor is this principle confined to the typical cases of attorney and client, trustee and *cestui que trust*, partners, tenants in common, and the like; but it applies wherever the circumstances require or induce one person to repose trust and confidence in another, and it will sustain a right of action for false statements fraudulently made even though they are expressions of opinion, such as representations of law."

As it appears from the petition that appellant's confidence in appellee was such as to cause him to employ and pay the latter to investigate the title of the Todds to the land upon which he took the mortgage, to accept his false report of its sufficiency and to submit himself wholly to his guidance in the matter of making the loan, it was the duty of appellee to deal honestly and fairly with him from the beginning to the end of the transaction; and above all, to frankly and truthfully reveal to

him any defects in the title of the Todds to the land offered as security for the loan and to advise appellant of the fact that he was being paid by the Todds liberal compensation for obtaining of him the loan for them; and if, as alleged in the petition, he falsely and fraudulently misrepresented these matters of desired and necessary information to appellant, or intentionally concealed them from him, and thereby induced him to make the loan, when otherwise he would not have done so, in either event appellee's conduct may well be said to have been actuated by bad faith and a fraudulent purpose to mislead, deceive, and defraud appellant. Therefore, if such bad faith and fraudulent intent should be established by proof, as alleged, appellant's right to recover of appellee such damages as he thereby sustained, will be free of doubt. It is not material that it was difficult to determine the precise character of the Todds' title to the land, or that the circuit court's conclusion respecting its character was rejected by this court; the fact remains that appellee concealed from appellant whatever doubts there were as to its being such a title as he was demanding, and positively and falsely represented the Todds to be the owners in fee, when they only owned a life estate therein, at the same time guaranteeing to pay appellant whatever loss he might sustain by the making of the loan to the Todds.

While it does not appear of record, it is said in the briefs of counsel that the court sustained the demurrer to the petition on the ground that the misrepresentations and guaranty made and given by appellee to obtain of appellant the loan for the Todds, not being in writing, were within the statute of frauds. This would have been true, if only the guaranty had been made. But here the right of appellant to recover the damages sued for arises out of the fraud and deceit of the appellee and such right is not affected by the statute; and as held in the several cases cited below, where one by false and fraudulent acts or representations induces another to enter into a contract or transaction resulting in loss to the latter, he is liable in damages therefor. *Warren v. Baker*, 2 Duvall 155; *Dent v. McGrath*, 3 Bush 174; *Thomas v. McCann*, 4 B. Mon. 601; *Ford v. McComb*, 12 Bush 723; *Vertres v. Head*, 138 Ky. 83; *Drake v. Halbrook*, 23 R. 1943.

It is true that in several of the cases, *supra*, a recovery of damages was refused because of the failure of

the proof to establish the fraud complained of; but in each of the cases the rule permitting a recovery as stated by us in the opinion is recognized, where supported by sufficient proof of the fraud alleged. Whether upon the trial of this case in the court below the fraud of appellee complained of will be established by the proof, we of course cannot tell, but we are convinced from the allegations of the petition that a cause of action is therein presented in behalf of the appellant; and for the reasons indicated the appeal prayed by the appellant is granted, the judgment of the circuit court reversed, and cause remanded, with directions to that court to set aside the order sustaining the demurrer that the pleadings may be completed, and the case proceed to a trial upon its merits.

Moberley v. Deatherage.

(Decided January 25, 1921.)

Appeal from Madison Circuit Court.

Deeds—Reconveyance—Contemporaneous, Collateral Agreement to Convey.—One who sells and conveys land by a general warranty deed without reservation therein cannot have a reconveyance of the land in the absence of fraud unless there be a contemporaneous, collateral agreement to reconvey and then only upon clear and convincing proof of the existence and contents of the collateral agreement.

A. R. BURNAM and J. J. GREENLEAF for appellant.

JOHN NOLAND and J. P. CHENAULT for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

On December 8, 1903, appellant Moberley conveyed by deed of general warranty to appellee Deatherage a tract of land of about 100 acres near Moberley Station in Madison county for a recited consideration of \$3,650.00, which was actually paid by Deatherage to Moberley. The grantor put the grantee in possession which continued uninterruptedly until the beginning of this action on December 7, 1918, by Moberley against Deatherage to have a reconveyance of the lands on the averment:

“That simultaneously with the execution and delivery of said deed the defendant, N. B. Deatherage, executed

and delivered to this plaintiff, a writing by which he promised and agreed to reconvey said property to this plaintiff at any time this plaintiff paid him back the principal of the purchase price, \$3,650.00, it being understood and agreed that the use of the property would offset interest and taxes, which writing has been lost or destroyed."

An amended petition avers that the original agreement to reconvey the said land was oral, but was shortly after the conveyance reduced to writing.

The answer admitted the purchase, conveyance and possession of the land, but denied the agreement to reconvey and the execution and existence of the writing. Therefore the only controverted facts are the agreement to reconvey the land and the execution and existence of the alleged writing evidencing such agreement. The evidence shows that Moberley was an improvident, wasteful heir to a large landed estate; that he and Deatherage were slightly related by blood and that they were very intimate friends; that Deatherage, a good business man, advised Moberley concerning the management of his business and Moberley confided in and relied on Deatherage for counsel and assistance. The two men were associated together in many ways, and Deatherage purchased other tracts of land from Moberley, but none of them is in controversy. About four years before the commencement of this action and some ten years after the deed was made in 1903, Moberley, who was then confessedly an inebriate, made a deed of trust whereby he conveyed the major portion of his estate to Deatherage as trustee, and this is pointed to with confidence by appellant to aid in establishing a trust relation between the parties to this action at the time of the making of the deed in 1903 assailed in this case.

The appellant Moberley says that he has no recollection of Deatherage promising or agreeing to reconvey the lands in controversy before the deed was made or at any time until the writing evidencing such agreement was voluntarily given to appellant by appellee a day or so after the land transaction had been closed, but Deatherage testified in substance that he told Moberley at the time of the making of the deed for the land that he would reconvey him the land any time in the future Moberley wanted to buy same, but not at the same price as appellant now claims the alleged lost writing pro-

vided. So it appears from both parties that there was some talk between them about a reconveyance of the land, at or near the time of the making of the deed, but there is a sharp conflict as to what was the purport of this conversation or agreement, if indeed there was such an agreement.

We are greatly aided in a decision on the facts, on this particular question, by the evidence of Moberley, concerning the land trade he was about to make with Dr. Vaught, involving the same land, only a day or so before the deed was made on December 8, 1903. Moberley says he priced the same tract of land to Dr. Vaught for \$3,000.00 and Vaught was about to buy it when Deatherage hearing of the trade, came to Moberley to dissuade him from making a sale of the land at all, but when he found Moberley determined to sell the land, he said to Moberley, if you sell then sell it to me and I will sell it back to you later if you want it.

Moberley testifying in his own behalf admitted he was offering to sell the land to Dr. Vaught for \$3,000.00 without an agreement to reconvey and that Deatherage gave him more money, but there is no averment in the petition or evidence to show that Moberley sold the land to Deatherage because of his promise to reconvey, if he did do so, or that such an agreement or promise induced, or influenced him in any way to make the conveyance to Deatherage or that there was any consideration whatever for such a promise to reconvey the land. On the contrary there is very strong evidence that the appellant would have conveyed the land to either Dr. Vaught or Mr. Deatherage for the price of \$3,650.00 without an agreement by the vendee to reconvey the property. Even if Deatherage intended for Moberley to have a reconveyance of the lands, as we feel sure he did, yet there is no evidence of an agreement between the contracting parties entered into at the time of the making or closing of the deal, that the grantee would reconvey on demand of the grantor, the only evidence to that effect being the evidence of Deatherage that he was willing to reconvey for a fair consideration and the alleged voluntary writing given by Deatherage to Moberley, a day or so after the transaction had been completed. Deatherage says there was no agreement to reconvey the land either at the time of the sale or at any time except he said to Moberley he would do so if Moberley so desired, and there is no

evidence whatever that Moberley either asked such an agreement or acquiesced in the suggestion made by Deatherage to make a reconveyance. In fact Moberley had fully made up his mind to sell the tract of land and he was not seeking or asking an agreement to reconvey the property which he was selling. Therefore, as there was no such agreement in fact, or no consideration to support such an agreement had there been one, the trial court properly dismissed plaintiff's petition.

One cannot have a reconveyance of land in the absence of fraud except upon clear and convincing proof of the existence and contents of the collateral agreement.

But it is insisted that the parties were not dealing at arm's length; that there was a trust relation between them which imposed a duty upon Deatherage to protect and preserve the rights of Moberley. While Deatherage and Moberley were intimate friends and Deatherage was helping and advising Moberley in the conduct of his business there is nothing about the business transaction under consideration which has the slightest appearance of betrayal of trust. Moberley was about to sell the land without the advice of Deatherage for \$3,000.00 and without the privilege to repurchase it at the same or any other price. Deatherage advised him not to sell, told him he did not need to sell, and that he should keep the land which was a part of the old home place. When Moberley made it plain he was going to sell in spite of the advice of Deatherage, appellee then told him he would give him more than \$3,000.00, the price asked by Moberley, and the deal was closed and deed made. Is there anything wrong about such a contract even though a friend buys the land rather than have a stranger buy it at a less price?

There was no trust relation between the parties at the time of the deal and making of the deed with respect to the lands in controversy. A trust deed was made about ten years after the deed in question and of course cannot relate back to the time of the making of the deed here assailed. Moreover it did not relate in any way whatever to the lands in question. It is not contended that Moberley was incapacitated to make a deed in 1903, when he sold and conveyed the lands to Deatherage, and there is no charge of fraud or mistake in the deed, which is a full and complete conveyance of the fee simple title to the lands without reservations or defeasance. The

chancellor, in dismissing the petition, in effect held that no written agreement was made between Moberley and Deatherage for a reconveyance of the lands, and the statute of frauds would intervene to prevent the enforcement of a verbal agreement had there been one, which is quite doubtful.

According to the averments of the petition, Deatherage agreed to reconvey the lands to Moberley "At any time the plaintiff paid him back the principal of the purchase price." This in effect is an averment that Deatherage agreed to reconvey to Moberley on demand if the demand be accompanied by the purchase price of \$3,650.00. If there was such a written agreement the obligee would have been obliged to make a demand for reconveyance within a reasonable time, and what was a reasonable time was one of fact to be found by the chancellor from all the evidence. Almost fifteen years elapsed between the alleged making of the promise and the demand to reconvey. It is likely the chancellor did not consider this a reasonable time in which to ask a reconveyance under the alleged terms of the lost writing, and for this reason found against appellant Moberley. If so we would not be inclined to disturb the judgment of the court, for we are of the opinion that fifteen years is too long, in a case like this, to wait before requesting a reconveyance.

The chancellor found the facts against the appellant Moberley and we are not at liberty to disturb such finding unless it be against the weight of the evidence. The evidence in many respects is well balanced, but upon the question of the agreement to reconvey the land, especially the contemporaneous oral agreement, the evidence, we think, preponderates in favor of the appellee Deatherage.

The judgment is therefore affirmed.

McFeena's Admr. v. Paris Home Telephone & Telegraph Company.

(Decided January 25, 1921.)

Appeal from Bourbon Circuit Court.

1. Pleading—Judicial Notice.—Facts of which the court is required to take judicial notice need not be stated in the petition, and a

- general demurrer will be sustained to a pleading if when the facts of which the court will take judicial notice is read into the petition, it presents no cause of action.
2. Courts—Judicial Notice of Acts of Congress.—A court will take judicial notice of the acts of Congress and proclamation of the President of the United States.
 3. Master and Servant—Governmental Control and Operation.—An action cannot be maintained against a telephone company by one injured through negligence of the employees of the government while the government was in control of the telephone company's system and lines.

JOHN J. WILLIAMS, for appellant.

DENNIS DUNDON for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

The petition in this case avers that Anna McFeena lost her life on July 9, 1919, through the negligence of the Paris Home Telephone and Telegraph Company, and prays judgment against that corporation for \$15,000.00 damages.

A general demurrer was sustained by the trial court to the petition for the reason that the telephone company was at the time of the accident to and death of Mrs. McFeena, in the possession and under the direction and control of the United States government through its Postmaster General.

The petition made no mention of government control of the telephone company, but contained only the usual and necessary averments of negligence to constitute a cause of action in favor of the administrator against the telephone company in the absence of government control. The trial court accepting the view that it should take judicial knowledge of the joint resolution of Congress of July 16, 1918, authorizing the President of the United States to take over and operate any and all lines and systems of telegraph and telephone in this country, as well as of the proclamation of the President putting that resolution into effect, and actually taking over all such lines and systems on July 22, of the same year, held the petition bad on general demurrer, in the absence of an averment in it showing government control, or plea presenting such facts. Of this order, and judgment following dismissing the petition the appellant complains on this appeal.

The joint resolution of Congress under which the government assumed control and management of the telephone and telegraph lines, reads as follows:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by system or systems. . . ."

The proclamation of the President of the United States, issued in taking over the telephone and telegraph lines and systems, in so far as it affects this litigation, is as follows:

" . . . Now, therefore I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United

States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"By subsequent order of said Postmaster General, supervision, possession, control, or operation, may be relinquished in whole or in part to the owners thereof of any telegraph or telephone system or any part thereof, supervision, possession, control or operation of which is hereby assumed or which may be subsequently assumed in whole or in part hereunder.

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

It is the contention of the appellant that as one section of the President's proclamation left to the Postmaster General the power and right to relinquish in whole or in part, said lines and systems to the owners thereof at any time, the presumption, in the absence of an averment to the contrary, is and should be that the lines and systems of the appellee company had been released from government control before the injury and death of appellant's decedent; that government control was and is a matter of defense which the telephone company should have presented by plea. Where the want of jurisdiction is apparent on the face of the petition, it may be taken advantage of by demurrer and no plea in abatement is necessary. 21 R. C. L. 521.

The recognized rule is, that a general demurrer to a pleading will be sustained if the pleading fails to aver facts sufficient to constitute a cause of action or defense, and this is our Civil Code provision, section 93.

In Newman's work on Pleading and Practice, section 368, it is said that a petition is demurrable if it appears on its face: (1) "That the court has no jurisdiction of the defendant or of the subject of the action; or, (2) that the plaintiff has not legal capacity to sue; or (3) that another action is pending in the state between the same parties for the same cause; or (4) that there is a defect of parties plaintiff or defendant; or (5) that the petition does not state facts sufficient to constitute a cause of action." To render a petition subject to demurrer for any of these grounds, *the defect must appear upon the face of the pleading*. Exceptions to this rule are matters

of which the court will take judicial notice. Such facts need not be stated in the pleading. A court will take judicial notice of all facts affecting the public at large and which should be known by the generality of the people of the state; this includes general statutes passed by the legislature of our state, laws of nations, laws of the United States, and proclamations of the President of the United States. *Mitchell, By, &c. v. Cumberland Telephone & Telegraph Company, et al.*, 188 Ky. 263; *Hines, Director General of Railroads v. Laurendien*, 84 Southern 780. This being true it was unnecessary for the plaintiff in order for the demurrer to have effect to have alleged in his petition the facts with respect to the joint resolution and the proclamation of the President taking over the telephone and telegraph companies, for these were matters of which the court was required to and did take judicial notice. If the facts of which the court was required to take judicial knowledge, when read into and considered a part of the petition, rendered it bad by showing that the plaintiff had and could maintain no action against the defendant company, the demurrer was properly sustained.

The joint resolution of Congress failed to provide for suits or actions at law against the telephone or telegraph companies, while under government supervision, and no such action can or could be maintained. All telegraph and telephone lines and systems were taken over with power to the Postmaster General to relinquish any of such lines or systems at any time he thought proper. The President's proclamation was the final word which placed all the lines and systems under government supervision, and prevented actions or proceedings at law against any such company during government control.

All such lines and systems were on July 22, 1918, under the Presidential proclamation, and before the happening of the accident to Mrs. McFeena, in possession and under the direction, control and supervision of the United States government for the duration of the war, unless sooner released by the Postmaster General. Peace has not been declared and there was no act of Congress, proclamation of the President or act of the Postmaster General of which the court could take judicial notice, relinquishing control of the appellee company, and the presumption must be indulged that the appellee com-

pany's lines and system were not in its possession and control at the time of the injury to and death of appellant's decedent, but were at that time in the possession and control, and under the direction and supervision of the United States government, which facts when read into and considered a part of the petition, make it plain plaintiff had no valid cause of action against the appellee company.

So considered it was incumbent upon the plaintiff in stating his cause of action to plead such facts as would show his right to maintain the action, and this could have been done in this case by showing that the appellee company had been released by the Postmaster General from government supervision, if it were a fact. Otherwise the presumption that all such lines and systems were under government control continued.

This and other courts have held in numerous cases that no action could be maintained for damages against a telephone or telegraph company for a tort committed while their properties were in the possession and under the control and supervision of the United States government.

The case of *Mitchell v. Cumberland Telephone & Telegraph Co.*, reported in 188 Ky. 263, was such a case and we said:

"As said in the cases, *supra*, if suits of this kind could be maintained under the circumstances, then indeed could property be taken without *any* process of law, since the only pretended claim to it would be that the defendant owned the property which was being operated at the time of the happening of the injury sued for, although it was then entirely out of his control and was taken without his consent. The fact that the plaintiff might be remediless because there was no provision for any suit against the United States (although regrettable) cannot strengthen his case. Numerous instances exist in this state where there are no remedies furnished for similar injuries. No county can be sued for negligence in the maintenance of its public roads; nor can a municipality, however negligent, be made to respond in damages for injuries inflicted while exercising a governmental function. In neither of those cases are there as potent reasons for withholding liability as exist in this case.

“The case of Witherspoon & Sons v. Postal Telegraph & Cable Co., 257 Fed. Rep. 758 (decided by the United States District Court for the Eastern District of Louisiana), relied on by appellant, is the only one announcing the contrary view, and it is expressly discarded by some of the cases, *supra*, and was decided before the opinion of the Supreme Court was rendered in the Dakota case. We do not therefore regard it as authority.”

It follows that the trial court correctly held the petition insufficient on demurrer and dismissed the action.

Judgment affirmed.

Ellison v. Commonwealth.

(Decided January 25, 1921.)

Appeal from Boyle Circuit Court.

1. Criminal Law—Acts Occurring in Different Counties—Jurisdiction.—The court of a county, in which a crime is wholly committed alone has jurisdiction of it, but, if the acts and effects constituting a crime occur in different counties, the courts of either have jurisdiction of the crime.
2. Receiving Stolen Goods—Elements of Crime.—To constitute the crime of knowingly receiving stolen property, the property must theretofore have been the subject of a larceny by one other than the receiver of the goods; the reception must have been with the knowledge of the recipient, that the property had been stolen; and the reception must have been with the intention to deprive the owner of it.
3. Receiving Stolen Goods—Place Where Crime Committed.—The crime of knowingly receiving stolen property under the statute is a crime complete in itself, and the place of its commission is not controlled by the place of the larceny, but, is committed where the stolen property is received, with knowledge of its character.
4. Receiving Stolen Goods—Elements of Offense—Evidence.—To sustain a conviction for the crime of knowingly receiving stolen property, a guilty knowledge must be shown on the part of the recipient, but, it is not necessary to prove an absolute knowledge from express information received or personal observation of the larceny, but, if such facts are shown, as from which a reasonable man of ordinary observation would morally know, that the goods had been stolen, this will constitute such evidence as from which the jury may infer, that the recipient had full knowledge of the character of the property, but, mere suspicion or belief, in the

absence of such circumstances as above described will not sustain a conviction.

5. **Receiving Stolen Goods—Knowledge of Fact.**—The rule in equity, which provides that one shall be deemed to have knowledge of a fact, when such circumstances are brought to his attention, as would cause a man of ordinary prudence to be upon his guard, and when diligently pursued would result in a knowledge of the fact, does not apply to knowledge of the stolen character of goods, as such rule would make one liable to criminal punishment for want of ordinary prudence or negligence.
6. **Receiving Stolen Goods—Evidence.**—Guilty knowledge in the reception of stolen goods, as well as the fact of receiving such goods, can be proven by evidence of circumstances, as any other facts may be proved.

J. S. OWSLEY, BAGBY & HUGUELY and J. W. HARLAN for appellant.

CHAS. I. DAWSON, Attorney General, and W. P. HUGHES for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.

The appellant, Ellison, was convicted, upon trial, on an indictment, which accused him of guilt of the crime of knowingly receiving stolen property, denounced by section 1199, Kentucky Statutes. The venue of the crime was laid by the indictment in Boyle county, and the stolen property which was alleged to have been received by the appellant, were certain boxes of cigars of the value of more than \$20.00, and that same had been stolen from the Cincinnati, New Orleans and Texas Pacific R. R. and Southern Ry. Co., which were common carriers, and which had, at the time of the larceny, the cigars in their possession for transportation and delivery, they being operated as one corporation. The trial resulted in a verdict of guilty against the appellant, and the fixing of his punishment at confinement in the penitentiary for one year, and a judgment was rendered in accordance with the verdict. The appellant's motion for a new trial having been overruled, his dissatisfaction with the judgment has resulted in an appeal.

Several grounds for a new trial were assigned, but when considered, they resolve themselves into the following:

First. The court erred in overruling a demurrer to the indictment.

Second. The court erred in submitting the case to the jury; because there was no evidence conducing to prove appellant's guilt.

Third. The court erred in instructing the jury.

Fourth. The court erred in the admission and rejection of testimony.

(a) Touching the first ground for a new trial, the record fails to disclose that appellant, ever at any time, offered a demurrer to the indictment.

(b) At the close of the testimony for the Commonwealth, and at the close of all the testimony, the appellant moved the court to direct a verdict in his favor. These motions were overruled. The only basis which could have existed for such motions, and which would have justified their being sustained, was that when all the facts, which the evidence conduced to prove, and the reasonable inferences which could be drawn therefrom were considered, there was yet no evidence of the appellant's guilt as charged in the indictment, or at least no evidence of one or more of the elements which were essential to constitute the crime of which he was convicted. To constitute the crime of knowingly receiving stolen property, under section 1199, Kentucky Statutes, the property received must theretofore have been the subject of a larceny perpetrated by one, other than the party accused of having feloniously received it; the reception must have been with knowledge of the recipient that the property had been stolen; and the reception must have been accompanied with the intention to deprive the owner of it. That the property which appellant was accused of receiving had been stolen from the common carriers mentioned, and that they had the property in their possession for transportation and delivery, is amply sustained by the evidence, and no further attention will be given to that phase of the case. The evidence tends to show that the car, from which the cigars were stolen, arrived in the yards at Danville, in the afternoon of the 25th day of April, and the larceny occurred between that time and the early morning of the 26th day of April, and on the afternoon of the 26th, between fifty and one hundred boxes of the cigars, which had been stolen, were found to be in a room which appellant was at that time occupying, in the third story of a building, upon a street in Danville. The appellant admits that he received ten boxes of these cigars in Lincoln county, but it is insisted

for him that he did not receive any of the cigars in Boyle county, where the indictment alleges the reception, and within the jurisdiction of the Boyle circuit court, wherein the trial and conviction were had, and that there was an entire failure of evidence which proved that he received the cigars, in any way, in Boyle county, or that he had any knowledge of their having been stolen at the time he received them. It must be conceded that, although the appellant may have known the stolen character of the cigars, he was in no wise guilty of the crime of knowingly receiving stolen property, until he received them, and a failure to prove that he received them in Boyle county or that an act was done by appellant in Boyle county, the direct effect of which was the reception of the cigars would have been fatal to the prosecution, and entitled the appellant to a directed verdict in his favor. The crime of knowingly receiving stolen property is a substantive crime complete in itself, and is not, under the statute, an accessorial act to a larceny, and the place of its commission is not controlled by the place of the larceny, but is committed where the stolen property is received, with knowledge of its character. *Allison v. Commonwealth*, 83 Ky. 254; *Roberson*, section 448. If the act of knowingly receiving stolen property was one accessorial to a larceny, the acts would be those of an accessory after the fact, and the same rule would apply as to jurisdiction. *Tully v. Commonwealth*, 13 Bush 142.

Hence it becomes necessary to examine the evidence to determine whether there was evidence to support the verdict to the effect that appellant received the cigars, or any of them in Boyle county, or any act was done by appellant in such county, the effect of which was the reception of the cigars, elsewhere with the knowledge at the time of their reception of the stolen character of the cigars. Only two witnesses deposed to anything which occurred in Boyle county concerning the connection of the appellant with the cigars, and these witnesses are the appellant, himself, and his cousin, McKinsie. McKinsie was offered by the prosecution and deposed that the appellant was an extra brakeman upon the railroad, and occupied, while in Danville, an upstairs room, which one Virgil Davis, also occupied with him. About the 26th or 27th of April, or near that time, the witness met appellant, who apparently had just returned from a trip upon the railroad, and accompanied him to his room.

There he observed, under the bed and covered up by the quilts, together, between fifty and one hundred boxes of cigars. Appellant made no comment concerning the cigars, but about that time Davis came into the room and witness inquired of him about the cigars, and Davis said that they were his, but made no statement as to where, or when, or how he had procured them. While the cigars remained there, witness and appellant each smoked four or five of them. The following morning, Davis, who had an automobile, in his possession which was owned by someone else, inquired of witness and appellant if they did not desire to take a ride, and they having accepted the invitation, Davis wrapped the cigars in a quilt, belonging to appellant, and carrying them down the stairway to the door, put them in the automobile, they being still concealed by the quilt. Then he, witness and appellant got into the machine, and Davis drove them to Waynesburg, in Lincoln county, about twenty miles away. There Davis entered a store for the purpose of selling the cigars, but failing to find the keeper, he returned to the car and said that he would have to take them back to Danville, when the appellant said that the barn at his father's dwelling, about one and a half miles away would be a good place to put them. They then drove to the home of appellant's father and Davis put the cigars in the barn, or at least put them somewhere out of the automobile. They had dinner at the dwelling and returned to Danville on that afternoon. The appellant deposed that he was absent from Danville on a visit to his father's home, having left Danville at 11 o'clock a. m. on the 25th and did not return until the afternoon of the 26th. In this statement he is not corroborated, but if true, it would seem that it would have been easy to have found corroborating witnesses. When he and McKinsie went to his room on that evening, he saw the cigars there for the first time. He asked McKinsie about them and he said that Davis had put them there. When Davis appeared, he inquired of him concerning them, and Davis said that he had bought them in Lexington for seventy-five cents per box, as they were damaged; he had rented the room he occupied, but that Davis occupied it with him, with his permission, and could enter the room in his absence as it was not locked; he had no knowledge that the cigars had been stolen. Otherwise his statements agreed with those of McKinsie, except

that when at Waynesburg and Davis had failed to sell the cigars, although he seems not to have made but one effort, it was then raining and Davis inquired of him if he could not leave them at appellant's father's house, and he told him that he could. Davis, when they arrived, put them in the barn, and all three returned to Danville without them. He further deposed that Davis said that he was taking them to Waynesburg, because he could get a better price than at Danville. Thereafter Davis went to Waynesburg and took away all of the cigars, except ten boxes, which he thereafter gave to appellant, who used one box and sold the other nine for one dollar per box. The man to whom he sold them deposed that appellant told him that he had won the cigars. Davis fled the country when an investigation of the larceny was begun. Davis was not engaged in the cigar trade, and was in most part without visible employment. An affidavit of appellant was offered in evidence by the Commonwealth and which was made by him when the investigation of the larceny was being had, and in this he stated that the cigars remained in his room for three or four days, and that he requested Davis to remove them, at the same time inquiring of him, if they were stolen. There were sixty-five boxes of them. He also stated in the affidavit that Davis told him that the reason he brought them away from Waynesburg, was that he could get a better price for them in Danville. McKinsie deposed that the cigars were fresh and undamaged. The evidence proved that they were of the value of about six dollars and twenty-five cents per box. The appellant, further, deposed that some time, not exceeding two months, after the cigars were stolen and taken to Waynesburg, and put in the barn of appellant's father, at whose dwelling appellant made his home, Davis in Boyle county, made a gift to him of ten boxes of the cigars, which were at the barn, and which he accepted at the time, and thereafter sold the cigars, for one dollar per box.

It is insisted, that the court erred to the substantial prejudice of appellant's rights, by refusing to direct the jury, to disregard and not consider, the proof of any facts, concerning the cigars, and appellant's connection with them, which occurred, in Lincoln county, but, this manifestly was not error. While the appellant could not be convicted upon evidence, which proved that he

wholly received the cigars in Lincoln county, yet, the facts transpiring in the latter county, with reference to the cigars, was competent, as shedding light upon the issue, as to whether or not the cigars were received by him in Boyle county, and the knowledge of appellant as to their stolen character. The evidence of one's guilt of a crime, in a county, is not confined to facts and circumstances occurring, in that county.

There is indeed no testimony, which proves that appellant had absolute knowledge, that the cigars were stolen property, from having been actually informed, that they were stolen, or from personal observation of the act of stealing, but proof of such absolute knowledge is not necessary to sustain a conviction, though mere suspicion or belief is not sufficient, and in *Young v. Com.*, 4 K. L. R. 55, this court held, that an instruction defining the crime should use the word "know," without modification, instead of "believe." In certain jurisdictions it is held that goods received under circumstances that would cause any reasonable man of ordinary observation to morally know, that they were stolen will sustain a conviction of knowingly receiving stolen property. *Birdsong v. State*, 120 Ga. 850; *Cobb v. State*, 76 Ga. 664; *State v. Freedman*, 3 Penna. 403; *Hester v. State*, 103 Ala. 83; *Collins v. State*, 83 Ala. 434. While the statute, section 1199, *supra*, uses the term "knowing," and we have held, that it is erroneous to rest the guilt of an accused upon any less degree of information, it has always been held, that the proof of receiving goods under circumstances, that would cause a reasonable man of ordinary observation to believe or to morally know, that they were stolen, constitutes evidence from which a jury is authorized to infer and to find, that the recipient of stolen goods had full knowledge of their character, and hence a conviction of guilty knowledge may be sustained by circumstantial evidence. This is true, although the equitable rule, which provides, that one shall be deemed to have knowledge of a fact, when circumstances are brought to his knowledge, which would cause a man of ordinary prudence to be upon his guard, and which circumstances pursued with diligence would result in the knowledge of the fact, does not apply to the guilty knowledge required of one, who is accused of knowingly receiving stolen property, as the application of such a rule might render one criminally liable for want of ordinary

prudence or for negligence. *Robinson v. State*, 34 Ind. 452; *State v. Dosing*, 117 N. W. 869. Knowledge of the stolen character of property may, however, be shown, as said, by circumstantial evidence, as any other fact may be shown, including the fact of the reception of stolen property. *Newton v. Com.*, 158 Ky. 4. The evidence, that, the cigars, were shown by the markings upon the boxes, to be of the aggregate value of over \$400.00, that they were fresh and undamaged; that they were in possession of Davis, who claimed to have purchased them at a less sum than \$50.00, and who, appellant knew to be without visible employment, and as McKinsie described him "living upon other people," that Davis proposed to carry them from a populous place twenty miles away to a village to find a market for them, and there made no real effort to sell them, and then stored them away in a barn in the country and afterward gave appellant over \$60.00 worth of them, which appellant sold for \$9.00, after using a box, and concealing, from the purchaser, the manner, in which he obtained them, was sufficient evidence, from which the jury was justified in finding that he knew them to have been stolen. The evidence, which proved the extreme intimacy of appellant and Davis, who was manifestly the thief; the taking of so large a quantity of cigars to appellant's room, where they remained, according to his first sworn statement for three or four days; the indifference of appellant, to the presence of the cigars in the room, according to McKinsie, when appellant, as he deposes, first discovered their presence, indicating previous knowledge concerning them; that he accompanied Davis and the cigars on a ride of twenty miles, and then deposited them in a barn at appellant's father's house, without other excuse than the mere pleasure of a ride to a place, which he had left the preceding afternoon, and remained only long enough to eat dinner and then return; that Davis afterward removed all the cigars, except the ten boxes, when he could have as easily and as safely removed all, and without any excuse appearing as to why he left the ten boxes; that appellant appropriated the ten boxes; and the suspicious character of all their actions, was evidence, from which the jury was justified in inferring that a portion of the goods, any how, as much as the ten boxes, of the value of over \$60.00 was set apart to appellant, as his share, and was received by him, before the

removal from Boyle county, to Lincoln. If such understanding was arrived at between appellant and Davis, before the removal of the cigars to Waynesburg, the share of appellant became under his control and dominion and amounted to a reception, as such share then came into his actual possession, and under his control and dominion, although evidence may be lacking of any actual custody of the cigars, by him.

If it, however, should be conceded, that appellant did not receive any of the cigars, before their removal from Boyle county, he deposes, that in Boyle county, Davis made a gift to him of the ten boxes, which he had left at Waynesburg, and that he accepted of the gift, and in pursuance and because of same, he took corporal possession of them and sold them. Section 21, of Criminal Code provides, "If acts and their effects constituting an offense occur in different counties, the jurisdiction is in either county." If with knowledge of the stolen character of the goods, appellant had purchased them from Davis, in Boyle county, and by reason of the act of purchase, had taken corporal possession of the goods, in Lincoln county, there would be little ground for disputing the fact, that the receiving of the goods was the effect of the act of purchase, and the courts of either county would have jurisdiction of the crime. In principle, there could be no difference, between receiving constructive possession of the property by acceptance of the property, as a gift, in Boyle county, and as an effect of that act receiving actual possession of it in Lincoln county, as it is not necessary, that there should be a consideration between the thief and the receiver of the stolen goods to support a charge of receiving them, with guilty knowledge of their character, to constitute the crime.

(c) The instructions were in some respects erroneous, but their only fault was that they were more favorable to appellant, than he was entitled to, and hence, no discussion of them is necessary.

(d) The fourth ground, so far as relating to the admission of testimony, has already been considered, and no prejudicial error appears in the rulings relating to the exclusion of testimony.

The judgment is therefore affirmed.

Robertson, et al. v. Southern Bitulithic Company, et al.

(Decided January 28, 1921.)

Appeal from McCracken Circuit Court.

1. **Municipal Corporations—Street Improvements—Liability of Lot Owners.**—There is no common law liability upon lot owners to pay for street improvements; the liability is purely statutory, and to create a valid lien the statute must be followed.
2. **Municipal Corporations—Street Improvements.**—Where an ordinance for the improvement of a street provided that the work should be completed within six months after the passage of the ordinance, time not being of the essence of the contract as between the city and the property owners, the latter are not exempt from the payment of an apportionment for their part of the improvement where the city later extended the time for the completion of the work.
3. **Municipal Corporations—Ordinances—Resolutions.**—Under Ky. Stats., sec. 3235c, authorizing cities of the second class to be organized under the commission form of government, the distinction between the formalities attending the passage of an ordinance and a resolution is removed and they are placed upon the same basis of deliberation and efficacy.
4. **Municipal Corporations—Street Improvements.**—Ky. Stats., sec. 3235c, authorizes the construction or reconstruction of streets by either an ordinance or a resolution.
5. **Municipal Corporations—Ordinances.**—The extension of time for the completion of public work authorized by an ordinance may be granted by a resolution where, under the commission form of government, both an ordinance and a resolution are passed in the same manner.
6. **Municipal Corporations—Street Construction.**—Property owners will not be exempt from the payment of their part of the cost of construction of a street on the ground that the work was not completed within the time specified in the ordinance, where an extension was granted in a resolution passed after the period specified, the contractor having completed the work as per his contract, since under Ky. Stats., sec. 3100, it is provided that no error in the proceedings of the general council shall so exempt the property and which authorizes the courts to make all corrections that may be necessary to do justice to all parties.

JAMES CAMPBELL, JR. for appellants.

BRADSHAW & MacDONALD for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Paducah is a city of the second class organized under the commission form of government.

By an ordinance adopted April 10, 1916, and recorded the next day, the board of commissioners authorized the construction of Broadway from Eleventh to Sixteenth streets, on the ten year payment plan. It is provided in the second section of said ordinance that said work shall be completed on or before six months after the passage and recordation of said ordinance.

The contract for the work was awarded the Southern Bitulithic Company in a contract approved September 26, 1916, in section six of which it is provided the contractor shall commence the work within ten days after notice from the commissioners instructing it to proceed, the work to be completed within six months following the service of said notice.

By a resolution passed October 23, 1916, and recorded the following day, the commissioners extended the time for the completion of the aforesaid contract to October 1, 1917, work not to be commenced before April 1, 1917.

In said resolution the time for the completion of the work is given as October 25, 1916, whereas it should have been September, 1916, six months from the date the ordinance was recorded. It will be noted that this resolution was not passed until more than six months after the original ordinance became effective.

Appellants, the owners of property abutting said improvement, declined to pay the amount assessed against them, suit was filed on the apportionment warrants, and from a decision adverse to their contentions, they have appealed.

It is insisted that no valid lien was created for the cost of the improvement because the time for the completion of the work, as provided in the original ordinance, had expired before the commencement of the work. It is also contended that a lien for such improvements can be created by ordinance only and not by an order or resolution.

There is no common law liability upon lot owners to pay for street improvements; this liability is purely a creature of statute, and the latter must be followed to create a valid lien. *City of Henderson v. Lambert*, 14 Bush 24.

Under Kentucky Statutes, section 3096 (a part of the charter of cities of the second class), the general coun-

cil may by ordinance provide for the improvement of streets and other public ways. There is no complaint that the original ordinance did not follow this statute. We are concerned only with the fact that the work was not commenced nor completed within the period provided, as well as the validity of the resolution extending the time for completion.

The difference between an ordinance and a resolution is that the former prescribes a permanent rule of conduct or government while the latter is an order of the council of a special or temporary character. The ordinance is the more deliberate of the two and attended with the greater solemnity. Usually an ordinance can not become effective or be adopted at one meeting.

In practical operation, however, the distinction between the two depends upon the formalities attending the adoption of the respective acts. *Dillon on Mun. Corp.*, secs. 571 and 633, and see *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498.

In subsection 14, Kentucky Statutes, section 3235c, authorizing the organization of a second class city under the commission form of government, the distinction between the formalities attending the passage of an ordinance and a resolution is removed and they are placed upon the same basis of deliberation and efficacy. Under the same subsection, the construction or reconstruction of streets may be ordered by either an ordinance or resolution.

The reason for this change is plain. Under the commission form of government, the general council is abolished, and with few exceptions, the legislative, executive and administrative powers of the city are vested in the board of commissioners composed of the mayor and four commissioners. (Subsec. 12, sec. 3235c, Kentucky Statutes.)

A resolution adopted with all the formalities required in the case of an ordinance will be regarded as an ordinance and given effect accordingly since the substance, and not the form of the corporate act, is what governs. *Dillon on Mun. Corp.*, sec. 571; *Gleason, etc. v. Barnett, etc.*, 115 Ky. 890, 61 S. W. 20. The circumstances considered, we are of the opinion it matters not that the ex-

tension of time for the completion of the work on Broadway was granted in what was termed a resolution.

Ordinarily a contract for municipal work must be completely performed within the specified time, but this is not the question before us. The contract was awarded within the six months period. It would have been impossible for the work to have been done between September 26, 1916, and October 25, 1916. The commissioners and contractor well knew this, hence the allowance of additional time. As between the contractor or the city on the one side and the property owners on the other, time was not of the essence of the contract. The delay did not disadvantage the appellants. As a matter of fact, had the street been constructed under a contract executed in the spring of 1917, the cost of materials at that time would have increased the amount apportioned against each of the appellants; they profited by the earlier made contract. The time for doing work relating to public improvements is within the municipal discretion, nor did the commissioners violate this discretion when they extended the time within which the work should be done.

In another portion of the city's charter, Kentucky Statutes, section 3100, it is provided:

"Nor shall any error in the proceedings of the general council exempt any property from the lien for, or payment of such taxes after the work has been done and accepted as provided in this section, but the general council or the courts in which suits are pending, shall make all corrections, rules and orders to do justice to all parties concerned."

In *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129, it was held this section applied to any irregularity or informality in the adoption of a resolution or the prosecution of the work incident to a public improvement, and in *Denton, et al. v. Carey-Reed Co., et al.*, 169 Ky. 54, 183 S. W. 262, it was held applicable to a failure to file the executed contract and bond within thirty days as required by law.

A similar section of the statute, to-wit: Kentucky Statutes, section 2834, was held to apply in cases where it was claimed an ordinance was invalid because not recommended by the board of public works. *Gleason, etc. v. Barnett, etc.*, *supra*. And in *City of Louisville v.*

American Standard Asphalt Co., etc., 125 Ky. 497, 102 S. W. 806, section 2834 was held as sufficient authority to order the correction of an erroneous apportionment.

It is not claimed the work was not done according to the contract, nor is it shown that appellants have been prejudiced in any wise. Since no error in the proceedings of the general council, or the commissioners in the present instance, shall exempt from payment after the work has been done, under the mandate of the statute and to the end that justice might be done to all parties, if there was any error in the proceedings pertaining to the improvement of Broadway between Eleventh and Sixteenth streets, the lower court very properly held that it was such as could and should be corrected and the property owners were not exempt from liability for their part of the cost of the improvement.

Further reason for this conclusion is found in the same statute (sec. 3100), wherein it is said:

“ . . . And in no event shall the city be liable for any part of the cost of such improvement except as provided in section 3096.” (Exceptions not applicable here.)

It would not be meting out justice to the contractor, who has admittedly performed the obligations of his contract, to shoulder this loss on him when the city is not liable and where the property owner has received the benefit of the work.

The beneficent and just intention of the legislature as expressed in Kentucky Statutes, section 3100 and similar sections, should not be thwarted. It was intended by the legislature that technical objections formerly interposed to wholly defeat the claims of the contractor should give place to the more just provisions of the statute, where there has been a substantial compliance with the ordinance and contract, and to enable the courts to render a judgment such as will do complete justice to all parties. Courts of equity should be slow to exempt from liability under circumstances such as are presented by this record; on the contrary, they should adopt a construction that will preserve rather than defeat the contractor's right.

The fact that appellants protested against the work being done does not change the situation; there was no ground for protest, besides the notice was not delivered

until the contractor had begun the actual work of construction.

Finding no error in the judgment appealed from, same is accordingly affirmed.

Striger, Executor v. Carter.

(Decided January 28, 1921.)

Appeal from Kenton Circuit Court (Common Law and Equity Division).

1. **Exceptions, Bill of—Bystanders.**—Where the trial judge refuses to sign a bill of exceptions tendered in time, a bystanders' bill should be prepared and certified.
2. **Exceptions, Bill of—Tender of—Signing.**—A party tendering a bill of exceptions in time is not responsible for the court's delay in signing it, and in a direct appeal, a bill so tendered, though not signed, will be considered as properly in the record.
3. **Exceptions, Bill of—When Appeal Will be Dismissed.**—Where the record on appeal is not filed in time and no extension of time for that purpose granted, the appeal on motion will be dismissed though the filing of the bill of exceptions was delayed by appellee or by causes beyond appellant's control.
4. **Exceptions, Bill of—Right of Appeal Lost.**—Where a bill of exceptions is filed in time and the lower court fails to act upon it and no application is made to relieve the situation and no super-seedeas issued, after the lapse of four years, the right of appeal and the right to relief is lost and the judgment will be treated the same as if no appeal had been sought.
5. **Executors and Administrators—Services—Fees.**—It was not error to refuse to allow the executor and his counsel additional fees growing out of supplemental proceedings involving the estate, where a prior allowance is deemed ample to cover all services rendered.

RICHARD H. GRAY for appellant.

F. J. HANLON for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The will of Amelia Wilson, probated in November, 1913, after making certain specific bequests, including the payment of one hundred dollars to the executor, appellant herein, provided (by codicil) that the remainder of her estate be turned into cash and divided equally be-

tween her five grandchildren, one of whom is the appellee.

It is alleged in the petition that the final settlement filed in the county court by the executor showed a total sum received of \$8,628.37. Deducting certain proper disbursements of \$2,986.71 would leave a balance of \$5,641.66 to be distributed among those entitled thereto. Of appellee's one-fifth of the net sum, to-wit: \$1,128.33, she claimed she had received only \$600.00 and judgment was asked for the remainder of \$528.33.

It is not surprising that in this complex record of demurrers, motions to strike and various pleas, after an answer and several amendments had been filed, a motion should have been made to have the parties restate and reduce to one pleading their respective charges, defenses and counter-charges.

Notwithstanding a final settlement filed December, 1915, purported to account for the entire estate received, and in which appellant took credit for \$3,095.00 in fees for himself and his attorney, in an answer and counterclaim filed February 3rd, 1919, appellant claimed further expenditures on behalf of decedent's estate, amounting to \$2,266.10. Included in this latter item is \$1,950.00 additional fees to appellant and his counsel.

While both the county and circuit courts, on exceptions to the "final" report, reduced the total charge of \$3,095.00 to \$1,505.00, it yet remains that against this estate of \$8,628.27, there was sought to be charged for attorney's and executorial fees a total of \$5,045.00, and this does not include the gift of \$100.00 to appellant. The answer was made a counterclaim in an effort to recover back an alleged overpayment to appellee.

From the judgment sustaining in part the exceptions to the "final" report of settlement rendered January 22nd, 1917, appellant prayed, and was granted an appeal to this court. This judgment was never superseded nor has the record on appeal ever been filed. Appellant contends his right of appeal exists independently of Civil Code, section 738, regulating the time in which the transcript must be filed on appeal, since within the time allowed he tendered a bill of evidence and exceptions and the court "took time" and no subsequent order has been entered in that case. Having done all required of him

under the circumstances, appellant pleads that the present action should be abated. This is his main reliance.

Subsection 3 of section 337 of the Civil Code provides:

"If the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as part of the record, but not spread at large on the order book. If not approved, he shall correct it, or suggest the corrections to be made, and sign it. A party objecting to the judge's correction of an exception which purports to state the evidence, may, within five days after the bill is signed, file the exceptions as written by him, if its truth be attested by the affidavits of two bystanders; but its truth may be controverted and maintained by other affidavits filed in the clerk's office not exceeding five on either side."

Prior to the adoption of this Code provision a bill of exceptions could be signed by bystanders when the judge refused to sign it. *Arnold v. Leathers*, 2 Dana. 287.

In *Hayden, etc. v. Ortkeiss' Admr.*, 83 Ky. 396, a bill was tendered in time; the regular judge was absent at the time and the special presiding judge declined to make any order in the case because he was the administrator of the former adverse party, then deceased. Another special judge elected in the case, declined to sign the bill because the case was tried before the regular judge. Appellant in that case, as in the present one, claimed he had done all that was required of him and that he ought not to be prejudiced or prevented from taking an appeal by the death of his adversary or the absence of the judge who tried the case. The court held under the circumstances that appellant should have had the bill certified by bystanders.

Reason, as well as the policy of the law, dictates that a bill of exceptions should be certified by the judge who presided at the trial or by some one who heard it, since the object of the bill is to present to the appellate court a correct statement of the proceedings that transpired in the trial court that do not appear on the record book of the court.

The failure or refusal of the lower court to sign a bill tendered in time will not deprive a litigant of his right of appeal. When the judge refuses to sign the tendered bill, the proper course for counsel to pursue is

to prepare a bystanders' bill and have it certified. *Commonwealth v. Hourigan*, 89 Ky. 305, 12 S. W. 550. Such a procedure is authorized by a fair construction of the Code provisions relating to this subject. The prevalence of a contrary rule would leave a party remediless when the trial judge refuses to sign any bill.

A party seeking an appeal is not responsible for the court's delay in signing a bill properly tendered and this court in a direct appeal will consider the bill as properly in the record. *Chenault v. Quisenberry*, 19 R. 1632, 42 S. W. 717; *Meaux v. Meaux*, 81 Ky. 475. Where the circuit judge unduly delays to sign the bill, or to act upon it, either party may have remedy by application to this court. *The Proctor Coal Co. v. Strunk*, 28 R. 241, 89 S. W. 145.

On the other hand, where the record in this court is not filed in time, and there has been no extension of time by the court, a motion to dismiss will be sustained, although the filing of the bill was delayed by causes beyond appellant's control. *Wickliffe, etc. v. Turner, etc.*, 149 Ky. 379, 149 S. W. 833; or even when the delay was caused by the appellee. *Tennessee Central R. R. Co. v. Reeves' Admr.*, 143 Ky. 467, 136 S. W. 870. Other than tendering the bill and an accompanying motion to have same signed and filed, it does not appear that counsel ever made any effort by motion or otherwise to have the bill approved or filed; no application for relief was ever made in this court and no appeal perfected.

It has been four years since the judgment on the exceptions to the report of settlement was entered and we know of no provision of the Code that would permit an appeal to be taken or perfected at this time. As to the matters involved in that litigation, they must be taken as precluded by said judgment. An appeal will not stay proceedings on a judgment unless a supersedeas is issued, Civil Code, sec. 747; and none was issued in the earlier proceedings.

It is alleged that in one of the suits referred to, a rule was issued against the appellant to file a supplemental report, and upon appeal to the circuit court, his response to this rule was held sufficient, and the rule dismissed and he was adjudged his costs in the matter. Complaint is made on the present appeal because the judgment appealed from charged appellee with her pro-

portion of these costs but did not allow appellant any attorney's fees.

Doubtless the lower court was satisfied appellant and his counsel had been awarded ample allowance for all services rendered to and in behalf of the estate and with this conclusion we agree. Nor do we find any cause for complaint on the rulings of the court in passing upon the demurrers and motions.

This estate has been subjected to undue litigation and delay; it has been over seven years since the will was probated and the beneficiaries are entitled to have the estate settled as should have been done years ago.

Finding no error prejudicial to appellant, the judgment should be and is accordingly affirmed.

Baird & Williams v. Pewitt.

(Decided January 28, 1921.)

Appeal from Fulton Circuit Court.

1. Evidence—Parol Evidence—Parol evidence of the contents of a written instrument is never admissible in the absence of proof that the instrument itself can not be produced.
2. Evidence—Parol Evidence.—The admission of such parol evidence held to be prejudicial where the only other evidence upon the question at issue was the statement of a witness based largely if not entirely upon his recollection of the contents of the written instrument.

ED. THOMAS for appellants.

No brief for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

The only semblance of an issue upon the evidence and the only question submitted to the jury upon the trial of this action on a lost note for \$200.00 executed by defendant, now appellee, to T. A. Wallace & Son, and assigned by them to plaintiffs, was whether the assignment occurred before or after maturity.

Upon this motion for an appeal from the judgment for defendant, the plaintiffs insist the court erred (1) in the admission of evidence (2) in denying their motion for a directed verdict, and (3) that the verdict was flagrantly against the evidence.

Plaintiff Baird testified that the note was sold, endorsed and transferred to him and his co-plaintiff by the payees long before its maturity. The only attempted contradiction of this evidence was the testimony of a Mr. Newgent which is thus stated in the bill of exceptions:

"I am and was heretofore cashier of the Farmers Bank at Fulton, Ky. Some time late in 1917, I think it was, but one cannot be sure of the time, some bank down in Tennessee, sent to the Farmers Bank a note signed by Raymond Pewitt, for the sum of two hundred dollars, dated in February, 1917, I think and it stated on its face something about it being given for a jack. It was sent my bank for collection, I cannot give the name of the bank sending it. It might have been the Lascassas Bank. I did not make any book or other entry, memoranda or entry of any sort of the transaction. The note was then past due, or was a matured note at that time, when received by me. I handled it in the usual way, and it was sent in the usual way, just like most such transactions are. There was a statement or blank form or paper I will call a remittance form, to which this note was attached. The remittance form was such as banks generally use in sending items for collection. My recollection is, and I am pretty sure that the item was sent to my bank, for the account of T. A. Wallace. I think it was so written on this form of letter or remittance form the banker sending it used.

"The plaintiff objects to all statements as to what was on the letter with the note or on the remittance form, to which the note was attached and moves to exclude same. Objection and motion overruled by the court to which plaintiff then excepted.

"It is my recollection that there was no assignment of this note. That no name or names were then on the back of the note. I do not think Baird & Williams' name was on it or used in connection with it, as sent to me.

"Mr. Pewitt was notified of it and came in and was told what it was, and said he had compromised it or something to that effect, and that it was not to be paid, and did not pay it and I sent the note back to the bank which sent it to me, endorsing on the remittance blank or letter form, in substance that Mr. Pewitt understood that the said note was settled or not to be paid by him. That is all I know of it."

Cross-examination :

“Witness, Newgent, testifies that he could not state positively whether he looked on the back side of the said note to see if or not any name of payee or payees or any names at all were then written on the back of the note. He did not show the back of the said note to defendant, Pewitt, when Pewitt came in to see witness about the note. I am pretty sure, the note was sent to my bank, and for the account of T. A. Wallace, but am not positive that I looked over the note or on its back, to see and I can not state that there were none of the payees’ names or other names endorsed on the note or written thereon. I handled the item as a collection for the account of T. A. Wallace. To this statement, plaintiff objected, and objection overruled to which action plaintiff excepted. No I cannot state positively that the note then was the property of T. A. Wallace, nor that he had not theretofore endorsed it to plaintiffs.”

That the court erred in overruling plaintiff’s objection to the evidence of what the so called remittance letter contained is obvious, even if the letter itself would have been admissible, a question we do not now decide, since parol evidence of the contents of a written instrument is never admissible in the absence of proof that the instrument itself can not be produced, as is the case here; and that this was prejudicial error is also obvious since it is apparent that Newgent’s testimony in so far as it tends to prove that the note had not been endorsed before maturity is largely if not entirely based upon his recollection of the contents of the letter that accompanied the note rather than upon an inspection of the note itself or a knowledge of its conditions; and it is not improbable that the jury too was influenced by the same considerations in reaching a verdict.

In fact it is doubtful if Newgent’s evidence when purged of all reference to or dependence upon the remittance letter is of sufficient probative value to sustain the verdict or even to carry the case to the jury, but we refrain from passing upon these questions now, since a reversal must be ordered for the other reason assigned and the evidence upon another trial in all probabilities will not be the same.

Wherefore an appeal is granted, the judgment is reversed and a new trial ordered.

Wilson, et al v. Woodward.

(Decided January 28, 1921.)

Appeal from Ohio Circuit Court.

1. Deeds—Bodily Heirs.—The words “bodily heirs,” “heirs of the body,” “heirs lawfully begotten of the body,” and other similar expressions indicating descending lineal heirs when used in a deed or will are to be construed as words of limitation and not words of purchase, unless a different intention plainly appears from the language of the entire instrument; and if the language is so ambiguous as to be susceptible of two constructions that one will be adopted construing the words as ones of limitation and creating an absolute estate in the named grantee or devisee.
2. Deeds—Bodily Heirs.—The deed involved in this case as set out in the opinion examined and—Held that the named grantee therein took an absolute estate and that the words “bodily heirs” as applied to her were words of limitation and not of purchase.

C. E. SMITH and BARNES & SMITH for appellants.

A. D. KIRK for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

This suit involves a contest between three of the appellants and defendants below, who are the infant children of the other appellants and defendants, Thomas P. R. Wilson and Nannie E. Wilson, and the plaintiff and appellee, Earnest Woodward. The subject matter of the contest is to obtain a construction of a deed to 65 acres of land, located in Ohio county, which was executed by Thomas P. R. Wilson on November 17, 1903. Omitting signature, certificate, attestation clause and description, neither of which is pertinent to the question involved, it reads:

“This deed, between Thomas P. R. Wilson of Ohio county and state of Kentucky of the first part and Nannie Wilson and her bodily heirs of said county and state of the second part; Witnesseth, that the said party of the first part in consideration of the love and affection I have for the said Nannie Wilson and her bodily heirs, she being my beloved wife the receipt of which is hereby acknowledged, do hereby sell, grant and convey to the party of the second part her heirs and assigns, the following described property, viz.: . . . To have and to hold the same with all the appurtenances thereon, to

the second party her heirs and assigns forever, with covenant of general warranty."

Thomas P. R. Wilson and wife lived on the land at the time and continued to do so thereafter with their three infant children as they were born and on December 8, 1916, the parents executed an absolute deed conveying the land to the plaintiff, Earnest Woodward, who, upon the discovery of the prior deed involved here, brought this suit against his grantors and their infant children for a construction of it. The guardian *ad litem* appointed by the court to defend for the infants filed answer claiming that a correct construction of that deed was to convey a life interest in the land to the mother of the infants, Nannie E. Wilson, with remainder to her children, or if not, to convey a joint equal interest in the land to her and her children. The court construed the deed (copied above) to convey to Nannie E. Wilson a fee simple title to the land, and that her children took nothing thereby and adjudged accordingly. The infants by their guardian *ad litem* have appealed and are making the same contentions here that were made in their answer in the trial court; but we are unable to find any error in the judgment appealed from.

The terms "bodily heirs," "heirs of the body," "heirs lawfully begotten of the body," and other similar ones, as applying to a grantee in a deed, or a devisee in a will, at common law created what was known as an entailed estate giving to the named grantee or devisee a life estate and a similar estate to his lineal descendants, if any, at his death, and so on in a successive line as long as there were such lineal descendants; but in 1796 the legislature of Kentucky enacted what is now section 2343 of the Kentucky Statutes, which says: "All estates heretofore or hereafter created, which, in former times, would have been deemed estates entailed, shall henceforth be held to be estates in fee simple; and every limitation on such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple." Continuously since then this court in construing the section has consistently held that common law estates tail were converted by the statute into estates in absolute fee, unless from the language found in the whole instrument (deed or will) it appeared with reasonable clearness that it was the intention of the creator of the estate that a different construction prevail, in

which case the intention as gathered from the entire instrument transmitting the title would be adopted. Some of the numerous cases so holding are: *Allen v. Van Meter*, 1 Met. 264; *Brann v. Elzey*, 83 Ky. 440; *Louisville Trust Co., Guardian v. Erdmann*, 22 Ky. Law Rep. 729; *Combs v. Eversole*, 23 Ky. Law Rep. 932; *Tucker v. Tucker*, 78 Ky. 503; *Mitchell v. Simpson*, 88 Ky. 125; *Johnson v. Johnson*, 2 Met. 331; *Lachland v. Downing*, 11 B. M. 32; *Moran v. Dillihay*, 8 Bush 434; *Jones v. Mason*, 21 Ky. Law Rep. 842; *Hall v. Moore*, 32 Ky. Law Rep. 56; *Handy v. Harriss*, Idem. 224; *Pruitt v. Holland*, 92 Ky. 641; *Pelphrey v. Williams*, 142 Ky. 485; *Senters v. Big Sandy Co.*, 149 Ky. 11; *Howard v. Sebastian*, 143 Ky. 237; *American National Bank v. Madison*, 144 Ky. 152; *Lawson v. Todd*, 129 Ky. 132; *Bonnycastle v. Lilly*, 153 Ky. 834; *Fischer v. Stoepler*, 152 Ky. 317; *Dotson v. Kentland C. & C. Co.*, 150 Ky. 60; *Morehead v. Gibson*, 168 Ky. 102; *Belcher v. Ramey*, 173 Ky. 784; *Kirby v. Hulette*, 174 Ky. 257; *Smith v. Smith*, 180 Ky. 174; *Scott v. Scott*, 172 Ky. 658; *Meisburg v. Bryant*, 184 Ky. 600, and *Scearce v. King*, 186 Ky. 507. An examination of those cases will show that in some of them the court construed the term "bodily heirs," or others of similar import, to be words of limitation and not words of purchase, since there was nothing in the instrument in which they were used to indicate a significance to be given them other than their primary effect as fixed by the statute; while in others of the cases it was held that, because of expressions found in some parts of the instrument, and particular manner and connection with which the terms were used, the maker intended to use them in the sense of "children," and the court thereby construed them as words of purchase, giving to the named grantee or devisee either a life estate in the land or a joint interest with those included as "children," dependent upon what the court found was the intention of the particular grantor or testator. Under the above rule, so consistently adhered to by this court, the only power or authority we have is to look to the words of the deed under consideration and determine what significance the grantor therein intended to give to the words "bodily heirs" as used therein. In the caption of the deed there is nothing to even remotely indicate that the words were used in any other than their ordinary legal sense, i. e., "heirs," and consequently words of limitation. The only

other place in the deed where the words appear is in the granting clause, in which it is said, "in consideration of the love and affection I have for the said Nannie Wilson and her bodily heirs, she being my beloved wife . . . do hereby sell, grant and convey to the party of the second part, her heirs and assigns," etc. There is nothing in the quotation according to our minds to indicate any intention to convey any interest in the land to any person other than the named grantor, Nannie Wilson. On the contrary the language plainly indicates an intention to convey the land to her alone and the recitation of the fact that he makes such conveyance "in consideration of the love and affection I have for the said Nannie Wilson and her bodily heirs" lends no strength to the contention of attorney for the infants. That clause recites only the reason why the grantor was making the conveyance to his wife. It will be noted that the grant in the deed is "to the *party* of the second part *her* heirs and assigns." It is not "to the *parties* of the second part *their* heirs and assigns." The grantee by the express language of the deed is but one person and that person is the wife of the grantor, and the fact that he recites in the deed the reason why he made the conveyance to his wife can not enlarge its terms so as to include others not referred to as grantees. Suppose that the grantor Thomas P. R. Wilson in the granting clause of the deed in contest had expressed as a consideration or reason for executing it "affection I have for the bodily heirs of the said Nannie Wilson she being my beloved wife" without expressing as such consideration or reason any affection he had for his wife, could it then be contended that the "bodily heirs" of his wife meant *children* and were therefore used as words of purchase? We think not, and the fact that he expressed affection for his wife and *also* for her bodily heirs cannot possibly alter the character of estate which the wife took under the deed. Furthermore, if the contention of the guardian *ad litem* is the true one, then all the children born to Nannie E. Wilson, whether they were begotten by Thomas P. R. Wilson the grantor in the deed or by some future husband in case of his death or their separation followed by divorce, would take (although her interest in the latter case would be restored to the husband under our divorce statute) since such children would be her "bodily

heirs" and would fill the description in the deed. Surely no such result was in the contemplation of the grantor.

The same purpose and intention are plainly manifested in the habendum clause where the conveyance is expressed to be "to the second party *her* heirs and assigns forever, with covenant of 'general warranty.'" It is not stated therein, as is shown above with reference to the granting clause, that the conveyance is "to the second *parties, their* heirs and assigns forever," etc. The second party according to the language of the habendum clause is also but one person and the limitation of the estate is to "her heirs and assigns." Clearly there is no room for any doubt as to what the grantor meant by the language he employed in the deed under consideration. As to what he actually intended to but did not express can not influence us in considering what he actually expressed by the language he did employ.

If, however, the language was more doubtful than it is, and so much so as to admit of two constructions, one conveying the absolute fee to the named grantee, and the other conveying to her a less estate, it would then be our duty, under numerous opinions of this court, to construe the deed so as to convey an absolute fee. *Lawson v. Todd, supra*; *Edwards v. Cave*, 150 Ky. 272; *Baxter v. Bryan*, 123 Ky. 235; *Moore v. Sleet*, 113 Ky. 600; *Tanner v. Ellis*, 127 S. W. (Ky.) 995, and *Kirby v. Hulette, supra*.

It is therefore our opinion that the trial court correctly construed the deed involved, according to the statute, *supra*, and the numerous opinions of this court construing it, and the judgment is affirmed.

Banks v. Commonwealth.

(Decided January 28, 1921.)

Appeal from McCracken Circuit Court.

1. **Criminal Law—Setting Aside Verdict.**—A verdict of guilty in a criminal case will not be set aside on the ground of the insufficiency of the evidence to support it, unless it be so flagrantly against the weight of the evidence as to indicate that it was returned through passion and prejudice on the part of the jury; and this rule applies where the evidence is only circumstantial

in which case the verdict will be upheld unless the circumstances proven are such as to have but little or very remote probative qualities and amount to no more than a mere suspicion of guilt.

2. **Witnesses—Impeachment.**—Before a witness who is not a party to the suit may be impeached by proving contrary statements which he made out of court a foundation must be laid for the introduction of such contrary statement by inquiring of the witness concerning the statement with the circumstances of time, place and persons present, and this rule applies in criminal as well as civil cases.
3. **Searches and Seizures—Warrant.**—Under section 10 of our present Constitution, and article 4 of the amendments to the Federal Constitution, it is unlawful for an officer to search the premises, houses or possessions of a suspected offender without a duly issued search warrant authorizing him to do so, and evidence seized as a result of such unlawful search may not be used against the supposed offender in his trial on a charge subsequently brought. But if the search, though made without a warrant, is done with the permission, voluntary agreement and consent of the one rightfully in possession of the thing searched, the above rule will not apply and articles found as a result thereof may be relied on by the Commonwealth as evidence against the offender.

CROSSLAND & CROSSLAND and C. B. CROSSLAND for appellant.

CHAS. I. DAWSON, Attorney General, and CHAS. W. LOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellant, Hardin Banks, was the defendant in an indictment found by the grand jury of McCracken county accusing him of the crime of malicious shooting and wounding of another with intent to kill, and upon his trial thereunder the jury returned a verdict of guilty and fixed his punishment at confinement in the penitentiary for a term of five years, upon which judgment was pronounced, and to reverse it defendant prosecuted this appeal.

A number of alleged errors (some of them formal) are incorporated in the motion for a new trial but only four of them are seriously pressed by appellant's counsel in his brief, they being: (1) The refusal of the court to direct a verdict of not guilty upon motion made therefor by defendant; (2) that the verdict is flagrantly

against the evidence, which it is insisted is insufficient to sustain a conviction; (3) the refusal of the court to admit testimony offered to be introduced by the defendant, and (4) the admission of incompetent evidence offered by the Commonwealth over the objections of defendant.

Grounds (1) and (2) are so closely related that they may be disposed of together, and in order to do so it will be necessary to make a statement of the substantial facts as proven by the testimony. Sloan's grocery, located at the corner of Twelfth and Jefferson streets in the city of Paducah, was broken into about twelve o'clock on the night of February 29, 1920. Some policemen of the city seem to have received information at once of the burglary and they, with others, including John Clements (the person shot) went immediately to the scene, arriving there at five minutes past midnight. Some of the parties stationed themselves in front of the grocery while others, including Clements, went to the rear where was located a garage, the door to which they found open and a transom above the door leading from the garage into the grocery was opened. The parties prized open the back door of the grocery and Clements started to go in when he received the shot which struck him in the mouth, the bullet passing through his tongue and lodging in the back part of his neck, from which place it was extracted by physicians at the hospital to which he was taken. The burglar who did the shooting immediately ran out past or over the body of Clements and fled down an alley, but as he passed out of the garage he fired another shot at another member of the party who was standing at or near the garage door, but that shot missed the one at whom it was aimed. A policeman who knew defendant, and by whom he ran that night after the shooting, testified that from the best impression he could obtain of the fleeing burglar he very much resembled in build, size and features the defendant. There was about three inches of snow on the ground and no one had travelled the alley after the snow fell and before the burglar ran through it in his flight. Some members of the party followed the tracks to a house not far distant located at Thirteenth and Clay streets. For some reason they did not ascertain that night who lived in that house, but the next morning the tracks were again traced from the grocery to the same house at Thirteenth

and Clay streets, and it was there learned that defendant and his father occupied the house, and defendant, who appeared at that time, was wearing a pair of shoes the peculiar shape of which would indicate that the tracks, which were also peculiarly shaped, had been made by those shoes. The next day, which was Monday, some officers of the city again went to the house and while there they asked the father of defendant for the latter's shoes and he (willingly so far as the record shows) gave them to the officers who took them and applied them to some of the tracks left in the snow which had not melted, and there was a complete fit. Defendant was then arrested, and had on a corduroy cap and a mackinaw coat the same as a witness testified that the fleeing burglar wore on the night of the shooting. Defendant at the time of his arrest also had upon his person a 45 caliber Colts automatic pistol with only three loaded cartridges in it and with two of the chambers empty.

Defendant denied all knowledge of both the burglary and the shooting and stated in his testimony that he was at a named pool room from early in the night until near twelve o'clock when he went home and spent the remainder of the night. In support of his alibi two or three witnesses at the pool room say that he left there about fifteen minutes before twelve o'clock, and his father testified that he arrived home ten minutes before twelve. Only two of the alibi witnesses fixed the time by observing a timepiece; one of them was the owner of the pool room and the other one was defendant's father. They do not say that their timepiece, which they so cautiously observed on that particular night, was correct, but be that as it may, the proven facts which we have related establish strong circumstances pointing to the guilt of defendant and which were amply sufficient to authorize a submission of the defendant's guilt to the jury, and its verdict of guilt can not be said to be flagrantly against the evidence, especially where the only contradiction of the guilty circumstances consists in defendant's denial and the vague and unsatisfactory alibi which he sought to establish by his witnesses.

In the case of *Hall v. Commonwealth*, 152 Ky. 812, where the evidence against the defendant was entirely circumstantial this court in declining to set aside a verdict of guilty upon the ground that the evidence was in-

sufficient to authorize it, said: "The unanimous finding of the jury was that the defendant committed the deed. Our rule is not to disturb a verdict in a criminal case unless it is palpably against the evidence. (*Wilson v. Com.*, 140 Ky. 1.) While the evidence against the defendant is purely circumstantial, it was sufficient to take the case to the jury, and under the rule we have often laid down, we cannot disturb the finding of the jury." Only the same character of evidence on the part of the Commonwealth was introduced in the case of *Miller v. Commonwealth*, 182 Ky. 438, and in denying a similar contention made by defendant's counsel, as is made here, we said: "While this evidence is all circumstantial, it is certainly such evidence as tends to show the guilt of the defendant and required a submission of the case to the jury. Not only so, but this evidence was amply sufficient to sustain the verdict of the jury." Numerous other cases from this court, rendered prior to and following those referred to, sustain the rulings therein. The numerous cases cited and relied on by counsel for appellant are not in point, since the testimony for the Commonwealth in each of them consisted only in vague circumstances with but little, if any, probative force and creating at best only a suspicion of the guilt of the defendant on trial. As an illustration of them we need only notice the case of *Williams v. Commonwealth*, 182 Ky. 711. The evidence in that case as narrated in the opinion was correctly held to be insufficient to sustain a conviction because, as appeared from the record, the proven circumstances relied on by the Commonwealth were not only remote and weak, but were not inconsistent with defendant's innocence. It was a prosecution for the larceny of fifty dollars in money and the evidence showed that another had the better opportunity of committing the theft and that the proven circumstances pointed to her guilt more than to that of the defendant. It was also pointed out that such other person did not testify in the case nor was she offered as a witness. In its final summary this court in that opinion said: "But whatever probative effect the offer might have had in this trial, we are convinced that it was necessarily small, and was at best but a suspicious fact which, standing alone, is insufficient to sustain the conviction. *Lucas v. Commonwealth*, 147 Ky. 744; *Blankenship v. Commonwealth*, *Idem*. 768. Especially are we

satisfied with this conclusion when the facts show that another (Henrietta Wilson) had greater opportunities and was much more liable to have committed the offense than defendant." The points of difference between the facts of the other cases relied on and those of the instant one could be easily shown, but we do not deem it essential to consume the time and space necessary therefor. It will therefore be seen that grounds (1) and (2) are unavailable to defendant on this appeal.

The offered testimony which the court rejected and which forms the basis of ground (3) consisted in the proposal of defendant to prove by a witness that the officer who conducted the examination of the tracks on the night of the shooting traced them beyond Thirteenth and Clay streets to a point where they were lost and then said: "We will call this off and go back and say the defendant stopped there at Thirteenth and Clay." The court refused to permit the witness to testify to any such statement of the officer and it is now complained that the ruling of the court in that respect was a grievous and prejudicial error. Defendant had the right to impeach the officer as a witness by showing that he had made statements contradictory of his testimony as given on the trial (Civil Code, section 597), but such contradictory statements, made out of court (if the witness is not a party) may not be proven, unless the witness sought to be contradicted is first inquired of concerning the statement, with the circumstances of time, place and persons present. (Civil Code, section 598.) This practice, with reference to the impeachment of witnesses other than a defendant, obtains in criminal trials. *Higgins v. Commonwealth*, 142 Ky. 647, and *Taliaferro v. Commonwealth*, 151 Ky. 10. The officer in this case whose testimony was sought to be impeached by the rejected testimony, was not inquired about the statement when he was upon the stand, and no foundation was laid or attempted to be laid for the introduction of the statement as is required by section 598, *supra*, of the Civil Code of Practice. It is therefore manifest that the alleged error constituting ground (3), relied on for a reversal, is also without merit.

The incompetent evidence complained of in ground (4) consists, (a) in the statement of defendant's father to the officer when the shoes were obtained that they belonged to the defendant, and (b), that the shoes were

wrongfully obtained through an unlawful search of defendant's premises and that their evidentiary effect may not therefore be obtained by the Commonwealth, under the doctrine announced in the recent case of *Youman v. Commonwealth*, 189 Ky. 152.

The contention made in subdivision (a) is unavailable, since the court sustained an objection to the offered testimony and excluded it from the consideration of the jury. If, however, the court had not so acted, the error would not be material and prejudicial, since it was abundantly proven that defendant was the owner of the shoes and was wearing them on the Sunday after the shooting occurred, which was the day before he was arrested. This fact was testified to and defendant did not contradict it nor did he deny anywhere the ownership of the shoes.

Neither is the complaint made in subdivision (b) available to the defendant since the obtention of the complained of evidence (the shoes) was procured in a way essentially and materially different from the course pursued in the *Youman* case relied on, and the principles of that case can not apply to the facts of this one. The court in that case was dealing with a denounced, *unlawful* and *forcible* search of one's premises without his permission or voluntary consent and without a search warrant authorizing the officer to make it. The only fact in common with the two cases is that the officer did not have a search warrant. The "search and seizure" which the opinion in the *Youman* case forbids is a compulsory one, or one made in opposition to the will of the person in possession of the searched premises and to which he is compelled to submit, and is one made without his voluntary permission and therefore a forcible one rendering the searcher a trespasser *ab initio*. It was not intended by the court in that opinion to hold that it would be unlawful or incompetent to search premises with the knowledge and permission of the one lawfully in possession thereof. The act in that case would be stripped of all trespassing and unlawful features and consequently void of invalidating qualities. The sacredness of the premises and the security of the possession of the owner, which the forbidding constitutional provisions were designed to protect, would not be violated in that case. The father of appellant was rightfully in possession of the house in which the shoes in this case were found; in

fact, he himself willingly procured the shoes and delivered them to the officer.

This conclusion is a reasonable and logical one to be drawn from a consideration of the object and purpose of the constitutional provisions limiting the right of search of the premises of the citizen and of seizure as the result of it. But we are not without both text and judicial authority for the position taken. In treating the subject the writer in 35 Cyc. 1265, says: "Nothing will justify searching a dwelling for stolen property without a warrant for that purpose, *unless made with the consent or by the invitation of the owner;*" and on page 1276 it is said: "He (the officer) is also liable if he enters a dwelling house of another *against the will of the occupant* for the purpose of searching for stolen property without a warrant therefor." In the note to the case of McClurg v. Brenton, 123 Iowa 368, 98 N. W. R. 881, 101 A. S. R. 323, Mr. Freeman, the writer, says: "Perhaps, after a person is alleged to have committed a crime his premises may be searched for evidence thereof, without a warrant, by permission and with the assistance of the servant or agent of the owner," citing State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227, and Grim v. Robinson, 34 Neb. 540. In the McClurg case the court recognizes the right of the officer to search one's premises without an authorizing warrant if it is done with the owner's consent. In the Griswold case defendant was indicted for arson. The officers searched his office with the assistance as well as with the permission and consent of a servant whom the defendant had left in charge. Articles of a damaging evidentiary nature were found and the court held under the facts that they might be introduced and otherwise used as evidence against the defendant.

We therefore conclude that it would be carrying the doctrine of the Youman case entirely beyond reasonable limitations to apply it to the facts of this case, even if what was done by the officer in procuring the shoes could be denominated a "searching" of the premises. It might be true that if the defendant's father, or he himself, if present when the officer appeared and demanded the shoes, had objected and the officer had ignored the objection and forcibly entered the premises and obtained the shoes, or if the search had been made in their absence and without their consent, the doctrine of the You-

man case would have prevented the Commonwealth using them as evidence. We have no such case however, and are constrained to hold that the court committed no error in allowing the shoes to be introduced and otherwise used as evidence upon the trial.

Finding no error prejudicial to the substantial rights of the defendant the judgment is affirmed.

Bates v. Commonwealth.

(Decided January 28, 1921.)

Appeal from Madison Circuit Court.

1. Criminal Law—Misdemeanor—Presence of Defendant at Trial.—A defendant in an indictment for a misdemeanor has a right to be present at the trial, and it is error to try the cause and to render judgment against him in his absence, unless his absence is voluntary or at the least the circumstances do not deny such right to him.
2. Criminal Law—Misdemeanor—Absence of Defendant at Trial.—Upon the calling of an indictment for a misdemeanor, and the defendant, who has been duly brought before the court by proper process, fails to appear, the court will assume that his absence is voluntary, and that he thereby intends to waive his right, to be present, where no sufficient legal reason appears to the contrary, and the trial may be had in his absence.
3. Criminal Law—Failure of Defendant to Plead to Indictment.—Upon the calling of an indictment for a misdemeanor, the defendant, who is duly before the court by process fails to plead to the indictment, the indictment may be taken as confessed, and a judgment of guilty rendered and the punishment fixed and adjudged, by the court without the intervention of a jury, if the punishment for such offense is definitely fixed by law, but, if the punishment, which may be inflicted for the offense, is not definitely fixed by law, but, is one, within a discretion to be exercised between a maximum and minimum, a jury must be impaneled, not to determine the guilt, but to fix the penalty.

G. MURRAY SMITH for appellant.

CHAS. I. DAWSON, Attorney General, and W. P. HUGHES for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.

The appellant, James Milton Bates, was indicted for the offense of carrying concealed upon or about his person, a deadly weapon, other than an ordinary pocket knife. A warrant was ordered issued for his arrest to require his presence to answer the indictment and to perform the judgment of the court, and his bail was fixed at the sum of one hundred dollars. The bond required his presence in court upon the day the prosecution was set upon the docket for trial, but upon the calling of the case, the appellant failed to appear or to plead to the indictment. The court thereupon rendered a judgment which contained an order declaring the bond to be forfeited, and directing a summons to be issued for the surety in the bond, requiring him to appear on a day in the next term of the court to show cause why a judgment should not be rendered upon the forfeiture of the bond for the amount thereof. The court, also, without the intervention of a jury, rendered a judgment against appellant, adjudging that he was guilty of the offense charged against him in the indictment, and fixing and adjudging his punishment for the offense at a fine of one hundred dollars and imprisonment for forty days in the county jail, and if the fine and costs were not paid or replevied, that he should be imprisoned, accompanied with hard labor, until the fine and costs were satisfied at the rate of one day for each dollar of the fine and costs, and the forty days of imprisonment to be, also, accompanied with hard labor. In addition to the foregoing, it was adjudged that he should be disfranchised for the period of two years.

The appellant filed grounds for a new trial upon the ground that the action was tried in his absence, and that he was prevented from being present and pleading not guilty to the indictment, by unavoidable casualty, and further that the court erred to the prejudice of his substantial rights, in adjudging him to be guilty and fixing the amount of the punishment for the offense, without intervention of a jury to determine whether he was or was not guilty of the offense, and the amount of punishment to be imposed upon him. The motion for a new trial was overruled, and hence the appeal.

The court was not in error in rendering a judgment as by default, except for the reason hereinafter stated. Section 184 Criminal Code, expressly provides that a trial for a misdemeanor may be had in the absence of the

defendant. A defendant in an indictment for a misdemeanor has a right to be present at the trial, if he elects to do so, and to meet the witnesses against him "face to face." Section 11, Bill of Rights. A trial of a defendant, in his absence, for a misdemeanor, can be had when his failure to appear is voluntary, and does not grow out of circumstances which amount to a denial of his right to be present, and to plead to the indictment. *Veal v. Commonwealth*, 162 Ky. 250; *Threlkeld v. Commonwealth*, 167 Ky. 657. Section 157, Criminal Code, provides that "Upon arraignment or upon the call of the indictment for trial, if there be no arraignment, the defendant must either move to set aside the indictment or plead thereto." By section 155, Criminal Code, it is provided that an arraignment shall be made only on indictments for felonies. Hence, it follows that upon the call for trial of an indictment for a misdemeanor, it becomes the duty of the defendant to either move to set aside the indictment or to plead thereto. The pleadings of a defendant must be a demurrer or a plea. Section 162, Criminal Code. Section 171, Criminal Code, provides that if a defendant demurs, and the demurrer is overruled, it then becomes his duty to plead, and if he fails to enter a plea, "final judgment shall be entered against him, and if necessary a jury impaneled to fix the punishment." The situation of a defendant in an indictment for a misdemeanor, who has unsuccessfully demurred to the indictment, and then fails to enter a plea of any kind, could not be different from that of one who neither demurs nor enters a plea. A defendant in an indictment for a misdemeanor, if under bond for his appearance or having been duly summoned may waive his right to be present, and if present such a defendant may waive his right to enter a plea to the indictment; and construing the above provisions of the Code, together, it plainly appears that when an indictment for a misdemeanor is called for trial, and the defendant therein having been duly summoned or placed under bond to appear and to answer to the indictment, and who voluntarily fails or declines to plead to it, the indictment will be taken for confessed against him, and a judgment may be rendered by default against him without aid of a jury, except as hereafter stated. *Commonwealth v. Neat*, 89 Ky. 241. *Pursiful v. Commonwealth*, 20 K. L. R. 863; *Walston v. Commonwealth*, 31 K. L. R. 378;

Payne v. Commonwealth, 16 K. L. R. 839; Commonwealth v. Cheek, 1 Duv. 27. When a defendant in an indictment for a misdemeanor has been by process duly brought before the court, and fails to appear or to plead to the indictment, the court will assume, in the absence of anything to the contrary, that his action is voluntary. Hence, upon the calling of this action for trial and the defendant failing to appear or to plead to the indictment, and no reason being indicated to the court that his failure to either appear or to plead was involuntary, or that his right to do so was denied by circumstances, the court was not in error in assuming that he elected to fail to appear or to plead, and was therefore authorized to adjudge that the defendant was guilty of the charge in the indictment, and to so render a judgment, and to, also, adjudge the degree of his punishment, if same was a punishment definitely fixed by law. A defendant against whom such a default judgment has been rendered, may, however, of course, upon proper grounds, move for a new trial, and a setting aside of the judgment, but it is not found to be necessary for the purpose of this opinion to determine whether the grounds, offered by the appellant for a new trial, were or were not sufficient. Section 258, Criminal Code, provides in "verdicts of guilty" or "for the Commonwealth," the jury shall fix the degree of punishment to be inflicted, unless the same be "fixed by law." Under the requirements of this section of the Code, there can be no doubt, if the appellant had entered a plea of either guilty or not guilty and the case submitted to a jury, it would have been within the exclusive province of the jury to have fixed the amount of the fine and the length of the imprisonment, at some amount and period in its discretion between the minimum punishment provided, and the maximum if its verdict had been that the appellant was guilty. It will be observed that the minimum fine for the offense was fifty dollars and the maximum one hundred dollars, and the minimum period of imprisonment was ten days and the maximum forty days. A jury might have and could have in its discretion fixed the punishment at a point between the minimum and maximum punishment for the offense. The failure to plead to the indictment had the same effect as a verdict of guilty by the jury. In construing the above section of the Code, and a similar one in the former Code, this court has held in *Com. v. Cheek*,

1 Duv. 27; Com. v. Neat, 89 Ky. 241, and Pursiful v. Com., 20 K. L. R. 863, that upon the calling for trial of an indictment for a misdemeanor, and the defendant failing to plead thereto, the court is authorized to render a judgment by default against the defendant, and to fix, without a jury, the punishment to be inflicted, if the punishment is definitely fixed by law; but, if the law does not fix a definite punishment it was then within the discretion of a jury, and a jury should be impaneled to fix the punishment, and the court is without authority to inflict it, without the aid of the verdict of a jury. In such a state of case, the jury would be directed to find the defendant guilty and then to fix the punishment within the limits prescribed by law. If the court, in the instant case, should have, without the intervention of a jury, assessed the minimum punishment provided by law, so far as the appellant was affected, he would have had nothing of which to complain, as a jury could not have made it less, but the court assessed the maximum punishment, and being without authority to fix the punishment at all, it was a denial to appellant of a right guaranteed to him by law and the judgment must therefore be reversed.

The appeal, so far as relates to the order forfeiting the bail bond, is dismissed, as such order is not one from which an appeal may be taken.

The judgment is therefore reversed and cause remanded for proper proceedings not inconsistent with this opinion.

McIntire v. Marian Coal Company.

(Decided February 1, 1921.)

Appeal from Letcher Circuit Court.

Mines and Minerals—Surface Owner Cannot Interfere With Operation.—The surface owner of lands from which the minerals have been sold by deed granting all rights, privileges and easements on the surface which the grantee might deem necessary or convenient for mining and removing such minerals and reserving only such rights to the surface owner as were not inconsistent with the rights and privileges granted to the owner of the minerals, has no right to exclude or interfere with the owner of the mineral rights in the development of his property by limiting

his improvements and buildings to a certain part of the surface outside the cleared and improved land of the surface owner.

W. H. MAY and R. MONROE FIELDS for plaintiff.

JOHN D. CARROLL, MORGAN & HARVIE, P. T. WHEELER and W. O. DAVIS for defendant.

OPINION OF THE COURT BY JUDGE SAMPSON—Overruling plaintiff's motion for an injunction.

Defendant Marian Coal Co. and its lessors own and have in possession all the coal and other minerals in a particularly described tract of land containing one hundred and forty-two acres located in Letcher county. The deed under which it holds, in addition to granting all the coal and other minerals mentioned therein, grants certain specified rights and privileges by the following clauses:

"The parties of the first part have hereby sold, granted and conveyed, and by these presents do hereby bargain, sell, grant and convey unto said party of the second part, its successors and assigns all the following described property, rights, privileges and appurtenances, . . . And to use and operate the said land and the surface thereof, and any and all parts thereof, including the right to use, land and surface thereof, and any and all parts thereof, including the right to use, divert, dam and pollute water courses thereon in any and every manner that may, by party of the second part, its successors and assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, sold, granted or conveyed, including but not limiting to that of drilling, mining, pumping and therefrom removing or otherwise utilizing said pipe, telegraph or telephone lines, rights of way, roads, ways, timber, coal, mineral, slate, oil, gas, salt water, clay, iron, ore, mines, stone and subterranean substance and products thereof, and any and all other property and rights hereby bargained, sold, granted or conveyed, and for the transportation, therefrom of said articles; and also the right to build, erect, alter, repair, maintain and operate upon said land, and at its option to therefrom remove any and all houses, shops, buildings, tanks, derricks inclines, tipples, dams, coke ovens, store and warerooms, and ma-

chinery and mining, any and all equipment, that may, by the party of the second part, its successor and assigns be deemed necessary and convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, granted, sold or conveyed; and the right to thereupon convert, reduce, refine, store, dump and manufacture the said or any or all of said property, or products, in, upon and under said land, or other land owned, or hereafter acquired by said party of the second part, its successor or assigns, by purchase, lease or otherwise."

The plaintiff, Ben McIntire, is the son and grantee of Wm. McIntire, who made the deed for the coal, mineral rights and privileges mentioned and in part copied above, and the son claims and now resides upon the surface of the tract.

The deed to the mineral was originally made by Wm. McIntire to the Rockhouse Realty Co., Inc., predecessor in title of the defendant, Marian Coal Co., in June, 1907, reserving the surface with certain limited rights which we will later set out, and in August, 1911, he conveyed the surface and such rights as he owned to his son, Ben McIntire, plaintiff herein. Ben lived on the land at the time his father sold the minerals to the company, but did not own or claim any of it. Both defendant and plaintiff claim under deeds from Wm. McIntire, one for the minerals, which is the dominant estate, the other the surface or servient estate.

In his deed to the Rockhouse Realty Co., Wm. McIntire made the following reservations:

"But there is reserved to the parties of the first part all the timber upon the said land except that necessary for the purposes hereinbefore mentioned; and there is also reserved the free use of said land for agricultural purposes so far as such use is consistent with the rights hereby bargained, sold, granted and conveyed; and the right to mine and use coal for their own personal household and domestic purpose." These are the rights conveyed to and now held and claimed by plaintiff Ben McIntire.

The deed for the mineral contained a general warranty clause, but the foregoing are the only exceptions and reservations made by the grantor, and he only conveyed and attempted to convey to his son, the plaintiff, such title and rights as were reserved, and no more.

This case, therefore, involves the construction of the deed conveying the minerals to the Rockhouse Realty Co. in 1907, the question being: what rights have the successors of the grantee of the mineral to the use of the surface of the lands described in the deed? May the coal company erect and maintain houses, tipples, stores, roads or other structures used in connection with its mining lease any place on the surface which it shall "deem necessary or convenient," according to the language of the deed?

The rule is that where a deed which grants land and certain specified rights and privileges, there being no ambiguity in the instrument, it will be construed and enforced according to its terms. But where there is ambiguity or uncertainty in the deed the doubt will be resolved in favor of the grantee as agent of the grantor. There is no claim that the terms of the deed are ambiguous or uncertain, and no such claim could well be made, for it leaves nothing to be supplied, but makes a sweeping and complete conveyance of all the coal and other minerals and certain specified rights and privileges to the company, to be by it exercised at will, that is when it or its successors shall "deem it necessary or convenient" to do so. The terms of the deed could hardly be broader or mere sweeping in favor of the grantee.

Another fundamental rule of construction governing in cases like this is that the instrument shall be construed most strongly against the grantors and in favor of the grantee both upon the grant of the property and the rights and privileges specified.

In the reservation in the deed copied above it is provided that the use of the surface of the land by the grantor should not contravene any of the provisions of the grant, but should be "consistent with the rights, hereby bargained, sold, granted or conveyed" to the company. It thus plainly appears that the parties intended for the surface owner to have and exercise only such rights on the surface as did not interfere with the rights of the company or its successor to "build, erect, alter, repair, maintain and operate upon said land, . . . houses, shops, buildings, tanks, derricks, inclines, tipples, dams, coke ovens, store and warerooms, and machinery and mining equipment," and no more. In other words the parties agreed and by their deed evidenced their purpose to allow the company to have the full use

of the surface for all the above mentioned purposes, and others mentioned elsewhere in the deed, whenever and where "deemed necessary or convenient" by the grantee or its successors in title.

Reliance is placed upon the rule stated in *Blue Grass Coal Corporation v. Combs*, 168 Ky. 437, where we held the right of the coal operator to use the surface of the land to depend upon a reasonable necessity. The instrument there considered was a lease and not a deed, and its terms were very different from those employed in the deed now under consideration. That lease only gave the grantee the privilege of using the surface of the land when "deemed necessary" by him for the production of the coal leased. Here the deed allows the grantee every conceivable privilege, "deemed necessary or convenient" by it. It does not have to be necessary or even reasonably necessary, but if the grantee or its successors shall deem the structure or improvement either necessary or convenient, it may place the same upon the surface of the land, even though it may occupy the enclosed and improved land of McIntire, provided it does not destroy or render useless the improvements already placed upon the surface by him, and this includes his residence, barn, garden, orchard, well and such structures as are of a permanent and substantial nature.

The company may build all around these improvements, in reasonable proximity, and thus occupy all the surface which it may either deem necessary or convenient. In others words the grantors to the mineral deed agreed for a consideration that the company and its successors should have all these rights without interference from McIntire or his grantees, and that McIntire and his grantees should have the free use of the surface only when and to the extent that the company did not deem the surface either "necessary or convenient" to its business. This is a hard and apparently broad grant, but the parties grantors had the right, power and capacity to make such a contract and having done so both they and their successors to the surface are bound thereby. No one would have questioned the right of McIntire to have sold the land in fee, which would have carried with it all the rights and more, enumerated in the deed, and having the right to sell and convey all the rights and privileges therein, he

and convey a part thereof with certain enumerated rights, and be bound by such conveyance.

Undoubtedly, under the plain terms of the deed, the Marian Coal Co. has the right and could, by showing the necessity or convenience thereof, use and occupy the whole surface of the land in question even to excluding the plaintiff and taking his house and garden, but such taking would have to be after satisfaction or adjudged compensation for such improvements, which is but another way of saying that the mineral estate under the deed is dominant, superior and exclusive in every circumstance or condition where the owner thereof shall deem it necessary or convenient to make such use of the surface as the deed allows.

Courts have never interfered to prevent *sui juris* landowners from selling their lands or an interest therein to which the title was not questioned, nor interfered to prevent them from making contracts which relate to their real estate, which might prove burdensome in the future, where there is no fraud or mistake. When such a contract is made the parties must abide the results and courts will aid only in the enforcement of such solemn and properly executed agreements between the parties.

The plaintiff in this case does not claim to be an innocent purchaser or that any fraud was practiced upon or advantage taken of him, for he bought the surface some years after the execution of the mineral deed in which the grantee and its successor was given the sole right to use so much of the surface as it might deem "necessary or convenient." He, therefore, took the surface with full knowledge of the limited use he could make of it, for the deed was of record and he had actual knowledge of its terms. He is in no position to complain.

Of course the company cannot use the surface or any part thereof for farming or gardening purposes, or any other purpose not specifically granted by the deed or reasonably to be inferred from the nature and terms of that instrument.

We must hold with the trial judge that the contract means what it says, in the absence of ambiguity or uncertainty, and so holding overrule the motion of plaintiff for an injunction staying the Marian Coal Co. from the use and occupancy of the improved lands of plaintiff, except as herein set forth.

Chief Justice Hurt and Judges Settle and Clay sat with me on the consideration of this motion and concur in the conclusions reached.

Edlin v. Commonwealth.

(Decided February 1, 1921.)

Appeal from Hardin Circuit Court.

Criminal Law—Account Books—Entries—Evidence.—An account book kept and owned by a person other than the accused, though containing an entry of a date relating to the latter's whereabouts when the crime charged was committed, properly could not be introduced, or its contents read as evidence against him when on trial for the crime. But it was competent for the owner of the book and maker of the entries therein, when testifying as a witness, to refresh his recollection as to the material date shown by the entry in the book by examining the book and entry in the presence of the jury and then state, independently of the book, as was permitted by the court, such date and any fact showing its relevancy to the case known to him.

H. L. JAMES for appellant.

CHAS. I. DAWSON for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, Harley Edlin, was indicted, tried and convicted in the court below of the crime of carnally knowing a female under sixteen years of age. His punishment was fixed by the verdict of a jury and judgment of the court at confinement in the penitentiary ten years.

On this appeal from the judgment of conviction he assigns two alleged errors for a reversal. First, the admission of incompetent evidence, consisting of the introduction against him on the trial of a book of accounts by a witness, Shawler. According to the Commonwealth's evidence the crime was committed by appellant April 21, 1919, at which time he claimed to have been in Jefferson county, and Shawler testified that he was then at work for him in the neighborhood of the crime, and attempted to read from the book of accounts to establish the truth of his statement. His introduction of the book and attempt to read therefrom was objected to by appellant and the objection sustained by the court, who

admonished counsel and the jury that the book could not be introduced or its entries read as evidence, but that the witness could examine the book for the purpose of refreshing his memory and then make, independently of the book, his statement regarding the fact inquired about. This the witness did after the exclusion of the book as evidence; and while it is true that he thereafter made certain statements regarding its contents which should have been omitted and which the court excluded, this was all caused and brought out by counsel for appellant on cross-examination.

The book being incompetent was properly excluded, and considering the evidence of Shawler as a whole, we think his testimony as to the date in question given independently of the book and after refreshing his recollection from it, was properly allowed to go to the jury, and the court took great care in trying to exclude the book and its contents.

The second complaint is as to Shawler being allowed to remain in the court room before being introduced in rebuttal. Although the rule requiring witnesses to be absent had been announced, it does not appear that Shawler knew it, or that he had been told to retire. Under the circumstances we do not think his being permitted to testify an abuse of discretion on the part of the court. *Carlton v. Comlth.*, 7 R. 165; *Martin v. Comlth.*, 30th R. 1196; *Duff v. Comlth.*, 153 Ky. 644.

It is only where, on consideration of the whole case, the Court of Appeals is satisfied the substantial rights of the appellant have been so prejudiced as to prevent a fair trial, a reversal will be granted.

As in this case the appellant had a fair trial and the evidence of his guilt is conclusive, the judgment is affirmed.

Price Brothers v. City of Dawson Springs.

Price v. City of Dawson Springs.

(Decided February 1, 1921.)

Appeals from Hopkins Circuit Court.

1. **Municipal Corporations—Sewers—Damages.**—The legal obligation of a municipal corporation to construct sewers is one to be

voluntarily assumed, and if it does not undertake to create a system of sewers it is not responsible for damages caused by freshets. But when the municipality assumes the obligation of constructing a sewer it must keep the same in good order and repair, and is liable in damages for injuries caused by its failure so to do.

2. **Municipal Corporations—Sewers—Overflows.**—If the municipality owns or controls a sewer, its duty goes no farther than to see that it is so constructed and maintained as to carry off sewage emptied into it and prevent such overflows of the premises of property holders of the city as may be caused by ordinary rainfalls, i. e., such heavy rainfalls as might reasonably be expected in the locality. The city will not be responsible for overflows from extraordinary rainfalls, such as are not reasonably to be expected.
3. **Municipal Corporations—Sewers—Damages.**—Where in an action brought against a city by a property owner to recover damages for an overflow of his lot and building from a sewer, caused, as alleged, by the defectiveness of the sewer, and the answer of the city denies its ownership and control of the sewer; also that it was defective and controverts the plaintiff's right to damages, the issues thus made are to be determined by the jury under proper instructions of the trial court, from all the evidence introduced by the parties; and where, as in this case, the evidence is conflicting and the instructions correctly give the law, a verdict for the city will not be disturbed unless found to be flagrantly against the evidence, which does not appear.

YOST & FRANKLIN for appellants.

J. A. JONSON and LAFFOON & WADDILL for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

In these two actions against the city of Dawson Springs, the first instituted by a partnership composed of Geo. M. Price and J. M. Price, engaged in the retail drug business under the firm name of Price Brothers; the second by J. M. Price, damages were attempted to be recovered of the city for the flooding, as alleged in each petition, of the basement of a brick building on Railroad avenue owned by J. M. Price and occupied by Price Brothers as a drug store, by overflows of water and sewage from a sewer which the city negligently constructed and maintained in such defective condition as made it too small and otherwise insufficient to carry off the sewage and water from ordinary rainfalls that necessarily ran into and were intended to be carried off by it. The damages amounting to \$1,000.00, claimed

by Price Brothers, were for the alleged injury to and destruction by such overflows of certain merchandise carried in stock and for sale in their business, which they, as further alleged, were necessarily compelled to store in the basement of the building. The damages of \$500.00 claimed by J. M. Price were for alleged injuries to the building in question caused by flooding of the basement.

The answer filed by the city of Dawson Springs in each action contained two paragraphs; the first traversing the allegations of the petition therein, and the second alleging that the flooding of the building was caused by unusual and extraordinary rainfalls, and that the owners of the drug store and owner of the building were guilty of contributory negligence in failing to make any effort to drain the basement, or to remove the merchandise therefrom, both and either of which, it was alleged, might have been done by the use of ordinary care before the merchandise was reached or injured by the water overflowing the basement. All affirmative matters of the answers were controverted by replies. By agreement of the parties the two actions were submitted and tried together in the court below, the jury returning in each case a verdict for the city. New trials were refused the unsuccessful parties, respectively; and as by these appeals the judgments entered upon the respective verdicts in that court are before us for review and the two appeals have been submitted and considered together, the decision we have reached in each case and the reasons therefor will be set forth in this single opinion.

Two grounds are urged by appellants' counsel for a reversal of the judgments appealed from: First, that the verdicts are unsupported by and flagrantly against the evidence. Second, that the trial court did not properly instruct the jury. As bearing on the first of these contentions it should be remarked, that the appellee's ownership of the sewer is put in issue by the pleadings; it being not only denied in each of the answers that it was or is owned by the city, but also that it constructed, maintained or at any time controlled it, and we have rarely found evidence more conflicting than that contained in the record on these issues; that of appellants conducing to prove the city's construction and ownership of the sewer, and that of appellee as strongly conducing to prove that, except where it crosses the street known as Railroad avenue, the sewer is upon or under privately

owned lots of citizens of the city and that it was constructed and is maintained at the expense of these owners or others unconnected with the city government. It is true evidence was introduced in appellants' behalf to the effect that the sewer as originally constructed was changed by the putting in it of tile pipes by the Dawson Salts and Water Company from a point under its building across its lot and the court house lot; also that it lowered the sewer under its building below the cellar floor and placed a storm opening or manhole in the sewer on a lot in the rear of appellants' drug store; and to show appellee's consent to these changes in the sewer appellants introduced in evidence a resolution passed by its city council, but this resolution shows appellee's consent to the lowering of the sewer under the building of the Dawson Salts and Water Company and does not show appellee's consent to the laying of the tile pipes or opening of the man hole by that company. In other words the only change in or work on the sewer approved by the resolution passed by appellee's council, was under the building and lot of the Dawson Salts and Water Company, a private owner of the property affected, and as the only evidence of appellee's approval of the other work referred to in the pleadings or evidence was furnished by the oral testimony of two or three witnesses, and the only competent way of proving such approval was by some recorded action of its council to that effect, the oral evidence referred to, even had there been no evidence for appellants contradicting it, was incompetent and should have been excluded. The legal obligation of a municipal corporation to construct sewers is one to be voluntarily assumed, and if it does not undertake to create a system of sewers the city is not responsible for damages caused by freshets; but when it assumed the obligation of constructing a sewer it must use ordinary care to construct it properly and to keep the same in good order and repair, and is liable in damages for failure so to do. *City of Maysville v. Brooks*, 145 Ky. 126. Conceding, however, that the resolution in question establishes such control of the sewer by appellee as would make it responsible for injuries resulting from a negligent failure properly to maintain it, it would nevertheless remain to be seen whether the changes made in the sewer in question rendered it so defective as to cause the overflow of appellants' property complained of.

It is argued for appellants that the tile piping placed in the sewer so greatly lessened its carrying power as to render it insufficient to pass off, as it had formerly done, the volume of water collecting therein during ordinary rainfalls, and that this insufficiency, together with the lowering of the sewer under the building of the Dawson Salts and Water Company and putting in of the manhole made therein by that company, caused the water in the sewer to become obstructed and overflow therefrom through the manhole on the lot and into the building of appellants, thereby causing the injuries they sustained. On the other hand it is the contention of appellee that the carrying power of the sewer has not been lessened by the alleged changes complained of by appellants; that the flooding of appellants' drug store building was caused by unusual and extraordinary rainfalls, which were not, and could not reasonably have been, expected in that locality, or by any degree of care guarded against. Furthermore, that the loss of appellants' goods in the basement of the drug store might have been prevented by their removing them or putting them on temporary platforms above the standing water; and that in failing to so protect and preserve them appellants were guilty of contributory negligence, but for which the goods would not have been lost. We find that the evidence respecting these issues between the parties is as conflicting as that relating to the issue first discussed. Indeed, it would be a most difficult matter to determine in whose favor it preponderates. There is, therefore, no ground whatever for appellants' contention that the verdicts were flagrantly against the evidence. On the contrary the jury were properly permitted to pass upon it and having done so, and there being evidence to support their findings, their verdict in each of the cases must stand, unless there was some error committed by the trial court that can be said to have prevented appellants from obtaining a fair trial.

Our examination of the record has disclosed no such error. Appellants' contention regarding the instructions cannot be sustained. It is complained that instruction 1, in each case, though it properly told the jury they should find for the plaintiff if they believed from the evidence appellee negligently constructed or maintained the sewer in such manner as rendered it insufficient to carry off the water from ordinary rainfalls, it was fatal-

ly defective in failing to contain the additional words "or such heavy rainfalls as might reasonably be expected in that locality." We do not regard this omission reversible error. The addition contended for would have been proper, and it would be the better practice always to so word the instruction, but it will be found from an examination of the authorities that the instruction in both forms or either has been approved. *Hobson on Instructions*, section 407; and after all is said "ordinary" rainfalls, are such heavy rainfalls as may reasonably be expected in the given locality. *City of Louisville v. Knighton*, 30 R. 1037. The jury could not have been misled by the failure of the trial court to employ the tautology insisted upon by appellants and we are unwilling to reverse the judgments because of such failure.

Appellants also complain of the instructions respecting the measure of damages, which authorized no recovery for permanent injury to the drug store building. While such permanent injury seems to have been alleged in the petitions the only showing of injury to the building made by appellants' evidence was as to the diminution of its rental value, for which reason the damages claimed were properly confined by the instructions to such a recovery. The rule regulating a recovery in this class of actions is, that where the injury complained of is permanent and but one recovery can be had, the depreciation in the market value of the property is allowable, but if, as shown in these cases, the injury to the building is temporary and can be readily repaired, then the measure of damages is the depreciation in its rental value during the period sued for, if rented out, or, if occupied by the owner, the diminution in the value of the use of the property caused by the injury. *Pickerill v. City of Louisville*, 125 Ky. 213; *Central Con. Co. v. Pinkert*, 122 Ky. 720; *C. & O. Ry. Co. v. Robins*, 154 Ky. 387; *City of Madisonville v. Hardman*, 29 R. 253; *L. & N. R. Co. v. Carter*, 25 R. 759; *Hutchison v. City of Maysville*, 30 R. 1173. It being our opinion that no reversible error is shown by the record in either of these cases, the judgment in each is affirmed.

McNeal v. Smith.

(Decided February 1, 1921.)

Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. Trusts—Deed Will Support Conveyance.—A deed of trust which empowers the trustee to convey or mortgage the real estate upon the written request of the life tenant named therein and which deed specifically relieves the purchaser or mortgagee from the necessity of looking to the application of the purchase money will support a conveyance of the said real estate by the trustee in satisfaction of a mortgage debt equal to the fair cash value of the land.
2. Judgment—Collateral Attack—Infants.—A judgment which is obtained upon process improperly served on infants but in which action they were represented, can be successfully attacked only in a direct proceeding and not collaterally.

OSCAR BADER and POPE NICHOLAS for appellant.

HUGH B. FLEECE and R. W. HUNN for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

This appeal involves the construction of the terms of a deed of trust made by Fannie L. Slaughter of Louisville to the Fidelity Trust Company, now Fidelity and Columbia Trust Company, as trustee for Virginia Guthrie, life tenant, and her unnamed children as remaindermen.

The habendum clause of the trust deed says:

“To have and to hold the same unto the said Fidelity Trust Company in trust for Virginia Guthrie for the term of her natural life, with remainder in fee to the children of said Virginia Guthrie, with full power in said trustee to sell and convey said real estate upon the written request of said Virginia Guthrie, for reinvestment of the proceeds thereof in other real estate, or in such other securities as trustees are authorized by law to invest in, such reinvestment to be upon the same trusts and limitations as herein set out, and with power to mortgage the same upon the written request of said Virginia Guthrie for the purpose of securing funds with which to improve said real estate, and no purchaser or mortgagee shall be required to see to the application of the proceeds of such sale or mortgage.”

The trust company, as trustee, on the written request of Virginia Guthrie, in 1908, mortgaged the property conveyed by the deed of trust for an amount equal to its fair cash value. This indebtedness was evidenced by five serial notes bearing interest. These notes were not paid when due and the mortgagee commenced legal proceedings to enforce its lien on the trust property, which was done and a sale had.

In conformity to the judgment of the court ordering the sale and the report of sale of the master commissioner, a deed was made to the purchaser. In the proceeding in equity to enforce the mortgage lien the two infant children of Virginia Guthrie, who are designated in the trust deed as remaindermen, were made parties defendant and process issued against them, but it was not served on the father, who was living, but was served on the mother. To cure and make good this irregularity in the service of the process of the infants, the mother, Virginia Guthrie, made a request in writing of the trust company, trustee, to convey the property adjudged sold and which had been conveyed by the master commissioner, to the purchaser, and in compliance with this request the trust company did convey the property to the same person to whom the commissioner of the court had conveyed it. The purchaser thereupon took and paid for the property, and later conveyed it to appellee, Noah Smith, who on July 28th, 1919, entered into a written contract with appellant, Chas. McNeal, to sell it to him at the price of \$5,500.00. Smith agreed to make to McNeal a good title and give him a general warranty deed. When the title was examined McNeal refused to accept the deed of Noah Smith and pay for the property because the process was not properly served on the infants, and this suit was brought by Smith against him for specific performance of the contract.

The circuit court adjudged the title good, and Smith entitled to specific performance of the contract. McNeal appeals to this court insisting upon a reversal of the judgment against him, for the reason, as he claims, the title to the property is imperfect, the specific defect being the want of process on the infant defendants, who are named remaindermen in the trust deed.

With the petition the appellee Smith filed the deeds representing the mesne conveyances from Fannie L.

Slaughter to him, thus exhibiting his chain of title back to a source which is not questioned.

The judgment of the Jefferson circuit court under which the mortgage lien was enforced and the sale of property in question had was and is not void, and therefore cannot be collaterally attacked or called in question. Merely filing a demurrer to the petition in this case did not amount to a direct attack upon the judgment in that proceeding, and we are not prepared to say that a direct attack on the judgment would in any wise affect the title of the purchaser of the property.

Aside from this the trustee under and by virtue of the trust deed had full power and authority, on the written request of Virginia Guthrie, to either sell or mortgage the entire property or any part thereof, and the purchaser or mortgagee was not required to look to the application of the proceeds. This was a broad power and was exercised by the trustee, when it, at the written request of Virginia Guthrie, mortgaged the property, and later deeded it upon a similar request, to the purchaser at the decretal sale. A general power to sell and convey real property necessarily carries with it the power to sell and convey the same property in satisfaction of a mortgage debt.

We are therefore of the opinion that the circuit court correctly overruled the demurrer of defendant and adjudged appellee, Noah Smith, the holder of a perfect title to the real property described in the petition, and the judgment is affirmed.

City of Pineville, et al. v. Moore, et al.

(Decided February 1, 1921.)

Appeal from Bell Circuit Court.

1. **Appeal and Error—Right of Review.**—In the absence of an appeal therefrom, that portion of a judgment refusing an injunction against one of the defendants is not subject to review.
2. **Mandamus—Mandatory Injunction—Grounds—Persons Entitled to Relief.**—An action for mandamus and mandatory injunction must be prosecuted by the proper public officer when the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, but if the general public

as distinguished from the state in its sovereign capacity is affected, any citizen may sue out the writ or obtain the mandatory injunction.

3. **Mandamus—Mandatory Injunction—Grounds—Persons Entitled to Relief.**—A citizen, taxpayer and patron of the colored schools of a city, who sues on his own behalf and for the benefit of all other colored people who are bona fide residents of the city, may bring a suit for the purpose of obtaining a mandatory injunction compelling the members of the board of council to perform their statutory duty with reference to the levy of taxes imposed by the board of education in cities of the fourth class.
4. **Schools and School Districts—Constitutional Law—Right of Fourth Class Cities to Tax Property of White Citizens for the Support of Colored Schools.**—Section 187 of the Constitution, providing that in distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained, does not forbid the imposition of a tax upon the property of white citizens for the support of colored schools.
5. **Schools and School Districts—Right of Board of Education in Fourth Class Cities to Levy Annual Taxes for Erection of School Buildings.**—Sections 19 and 20, chapter 14, Acts 1920, construed and held to authorize boards of education in cities of the fourth class to levy annual taxes for the purpose of erecting school buildings.
6. **Schools and School Districts—Duty of Board of Education of Fourth Class Cities to Estimate the Amount of Money to be Used to Defray the Expenses of Maintaining the Schools, etc., and Enter the Same Upon the Minute Book of the Board.**—The duty of boards of education of fourth class cities under section 21, chapter 14, Acts 1920, approximately to ascertain the amount of money which would be necessary to be used to defray the expenses of maintaining the schools, including a sinking fund, repairs and improvements of buildings, and any liquidation of liabilities falling due within the current fiscal year, etc., and to enter the same upon the minute book of the board, is mandatory, and must be done before the board is empowered to make the levy or to require the general council or fiscal court to include the taxes so levied in their regular tax bills.
7. **Schools and School Districts.—Time for Board of Education of Fourth Class Cities to Certify to General Council Resolution Levying School Taxes.**—Under section 19, chapter 14, Acts 1920, providing that the board of education of fourth class cities shall, within thirty days prior to the time for the levy to be made in the charter of cities of the fourth class, approximately ascertain the amount of money which will be necessary to be used, etc., and authorizing and directing it to pass a resolution imposing taxes for school purposes, etc., and directing it forthwith to certify the resolution to the general council, the time for making the levy not being otherwise definitely fixed, the board of education

should certify the resolution to the general council within thirty days prior to June 1st, the time the clerk should begin the work of making out the tax bills, since sections 3535, 3536, 3542 and 3543, Kentucky Statutes, contemplate that the general council shall make the levy before that time.

8. Schools and School Districts—Cities of Fourth Class—Duty of Board of Education to Certify Resolution Levying Taxes to General Council Within Thirty Days Prior to the Time Prescribed by the Charter for the Levy to be Made by the General Council.—The duty of the board of education of a city of the fourth class to certify to the general council the resolution levying taxes for school purposes within thirty days prior to June 1st of each year is mandatory in view of the concluding provision of section 19 to the effect that if in any year the board shall fail to pass the resolution and make the certificate and request as aforesaid, the general council or its board of commissioners and fiscal court shall make a levy for schools that shall be the same as it was the year before, and a resolution not certified until July 20th comes too late.
9. Mandamus—Mandatory Injunction—Schools and School Districts—Cities of the Fourth Class—Petition—Sufficiency.—A petition asking for a mandatory injunction against the members of the board of council, requiring them to levy taxes imposed by resolution of the board of education in a fourth class city, was defective in that it never alleged that the general council had failed or refused to comply with the resolution.

E. R. BAKER for appellants.

CHARLES A. WOOD and JAMES H. JEFFERIES for appellees.

OPINION OF THE COURT BY JUDGE CLAY—Reversing.

John Moore, a citizen, taxpayer and a patron of the colored schools of Pineville, brought suit against the city of Pineville, the members of its board of council, and the board of education and its members, and asked for a mandatory injunction compelling the defendants "to take the necessary steps to provide for the education of all colored school children entitled thereto, and a suitable building for that purpose, and otherwise provide for the same, the same benefits as provided for white children." Subsequently an amended petition was filed, stating in substance that at a meeting of the board of education of the city held on July 20, 1920, the board adopted a resolution imposing and levying for school purposes for the year 1920 a tax of \$1.50 per \$100.00 on all real and personal property subject to taxation in the city of Pineville, and a poll tax of the amount of \$2.00 on each male inhabitant of said city over 21 years

of age, and in addition thereto, a tax of 40c upon each \$100.00 of taxable property for sinking fund purposes to meet and pay off the bonded indebtedness of the school district, and that said resolution was regularly certified and presented to the board of council. The amended petition concluded with a prayer for a mandatory injunction compelling the city of Pineville and the members of the board of council to meet and carry into effect said resolution. The special and general demurrers interposed by the defendants were overruled, and the defendants having declined to plead further, the prayer for an injunction against the members of the board of education was denied, but granted as to the members of the board of council, who were directed to meet at once and comply with the resolution of the board of education by levying the tax therein imposed and including it in the regular tax bills of the city. The city and the members of its board of council appeal.

The suit is based on an act defining boundaries for school districts embracing cities of the fourth class, and providing systems of schools in such districts, etc., approved March 13, 1920, and constituting chapter 14, Acts 1920. The act places the control of the schools in the fourth class cities in one board of education, except in certain cases, and it is admitted that Pineville does not come within any of the exceptions. Section 18 of the act provides that the colored schools or children shall be entitled to the same benefits, be governed by the same rules and regulations, and be subject to the same restrictions as the schools provided for white children. Section 19 of said act is in part as follows:

“Said board of education shall, within thirty days prior to the time prescribed for the levy to be made in the charter of cities of the fourth class, approximately ascertain the amount of money which will be necessary to be used to defray the expenses of maintaining the schools, including a sinking fund, repairs and improvements of buildings, and any liquidation of liabilities falling due during the current fiscal year, and conducting the business intrusted to the board during the current fiscal year over and above the amount due it by the state as provided in section 21, and shall enter the same upon the minute book of the board; and power and authority is hereby conferred upon such board of education to impose and levy *ad valorem* taxes upon all real and per-

sonal property in said city or district subject to and assessed for taxation for city or county purposes not exceeding a rate of one dollar and fifty cents upon each \$100.00 of taxable property, and also a poll tax on each male inhabitant over twenty-one years of age within said district of not exceeding \$2.00, and shall also levy a sufficient amount to provide for sinking fund purposes for the fiscal year, and the taxes accruing from so much of said levy as is made for sinking fund purposes shall be, by said board of education, at once irrevocably set aside and used for that purpose and not otherwise, and said sinking fund as above provided shall include the sinking fund for the entire outstanding bonded indebtedness for said board.

“The said board of education shall adopt a resolution imposing and levying an *ad valorem* tax upon all the real and personal property subject to taxation and assessed by said city or county for general purposes at such rate, but not exceeding one dollar and fifty cents on the \$100.00 valuation of said property, and a poll tax not exceeding the amount of \$2.00 on each male inhabitant over twenty-one years of age in said district as shall, in the opinion of said board, be necessary to produce in that year the total sum necessary to be raised to support and maintain the public schools of said district less the estimated sum to be received from the state common school fund and shall also levy a tax for sinking fund purposes, and said resolution shall be forthwith certified under the seal of the city board of education to the general council or the board of commissioners of said city, and where such district includes territory outside of such city to the fiscal court of said county, and said levy at the rate so fixed and certified shall be, by said general council or board of commissioners or the said fiscal court, added to and included in the regular tax bills of the city containing the ordinary levy, and said city shall, by proper ordinance, make such levy as also the said fiscal court shall make such levy and it shall be collected with the same by the same officers and in the same manner and at the same time as ordinary taxes for said city or county are collected by the collecting officers of the city.”

.Section 19 concludes as follows:

“If in any year the board shall fail to pass the resolution and make the certificate and request as aforesaid, the general council or its board of commissioners

and fiscal court shall make a levy for schools that shall be the same as it was the year before."

There being no appeal therefrom, that portion of the judgment refusing an injunction against the board of education is not subject to review.

Plaintiff's right to sue was raised by special demurrer. It appears from the petition not only that plaintiff was a citizen and taxpayer of the city, but that he was a colored person with two children of school age entitled to attend the colored school, and that he brought the suit in his own behalf and for the benefit of all other colored people who were *bona fide* residents of the city. Under the well established rule in this state, an action for mandamus or mandatory injunction must be prosecuted by the proper public officer when the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, but, if the general public as distinguished from the state in its sovereign capacity is affected, any citizen may sue out the writ or obtain a mandatory injunction. *Gay v. Haggard*, 133 Ky. 425, 118 S. W. 299.

One of the questions raised is that the Constitution forbids the imposition of a tax upon the property of white citizens for the support of the colored schools. There is no merit in this contention. Section 187 of the Constitution provides: "In distributing the school fund, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." It is true that the legislature has, in certain instances, provided that local school taxes shall be levied upon the property of white citizens for the support of the white schools and on the property of colored citizens only for the support of colored schools, but there is nothing in the constitutional provision requiring this to be done, or depriving the legislature of the power to provide that local taxes, both for white and colored schools, may be levied upon all the property of the city or district, as is the case in many municipalities.

Another contention is that section 19, *supra*, authorizes the board of education to levy annual taxes solely for the purpose of repairing and improving the existing buildings, and not for the purpose of erecting new buildings. Any doubt on this question arising from the language of section 19 is certainly removed by section 20,

which authorizes the issuance of bonds for the purpose of acquiring sites, and erecting school houses in the event that "the annual funds raised from other sources are not sufficient to accomplish said purpose or purposes." We therefore conclude that the board of education may levy annual taxes for the purpose of erecting school buildings.

It will be observed that section 19 makes it the duty of the board of education, within thirty days prior to the time for the levy to be made in the charter of cities of the fourth class, approximately to ascertain the amount of money which would be necessary to be used to defray the expenses of maintaining the schools, including a sinking fund, repairs and improvements of buildings, and any liquidation of liabilities falling due within the current fiscal year, and conducting the business intrusted to the board during the current fiscal year over and above the amount due it by the state as provided in section 21, and to enter the same upon the minute book of the board. While the act does not require the estimate so made to be certified to the general council as was formerly the case, it seems to us that the act imposes upon the board the mandatory duty to make the estimate and enter it upon its minute book. The manifest purpose of the act was to let the people know how much money would have to be raised by taxation to support the schools, and to fix in a general way the purposes for which the money so raised should be expended. Otherwise, the board, without taking any official action showing the necessity for such a levy, and without making any apportionment, could always levy the full amount authorized by the act and thereafter devote it to purposes other than those contemplated when the levy was made. We therefore conclude that before the board is empowered to make the levy, or to require the general council or fiscal court to include taxes so levied in their regular tax bills, it should make the estimate required by the act and enter the same upon its minute book.

Another question to be determined is when the levy made by the board shall be certified to the general council. The act plainly contemplates that this should be done within thirty days prior to the time prescribed by the charter for the levy to be made by the general council. All property is valued as of April 1st, section 3535, Kentucky Statutes, and the taxes are due on July 1st,

section 3536, Kentucky Statutes. The supervisors meet on the Thursday following the second Monday in May in each year, and may adjourn from day to day until their work is completed, not exceeding two weeks. Section 3542, Kentucky Statutes. As soon as practicable after the supervisors have corrected the assessment lists, they must be returned to the clerk, who, from them, must make out the tax bills for the year and turn them over to the city collector or treasurer, sec. 3543, Kentucky Statutes, who must advertise before the first day of July that the taxes are due. Section 3544, Kentucky Statutes. It will thus be seen that the precise time for making the levy is not prescribed by the charter. Clearly, however, it was the purpose of the legislature to provide that the levy should be made before the clerk is required to begin the work of making out the tax bills. The act contemplates that he should begin this work about June 1st in each year, and we conclude that the time for the general council to make the levy must necessarily be before that date. Therefore, the board of education should make its levy and certify the resolution to the board of council within thirty days prior to that time. Furthermore, this provision of the statute is mandatory, in view of the concluding provision of section 19, *supra*, to the effect that if in any year the board shall fail to pass the resolution and make the certificate and request as aforesaid, the general council or its board of commissioners and fiscal court shall make a levy for schools that shall be the same as it was the year before. Here, the resolution of the board was not passed and certified to the general council until July 20th, or long after the taxes were due and payable under the law. This was too late, and the resolution not having been passed and the certificate and request made within the time prescribed, it then became the duty of the general council to make the levy for schools the same as it was for the year before.

The petition was also defective in that it never alleged that the general council had failed or refused to comply with the resolution of the board.

It follows that the demurrer interposed by the city and the members of the general council should have been sustained, and the injunction refused.

Judgment reversed and cause remanded for proceedings not inconsistent with this opinion.

Vaughan, et al. v. Heistand, et al.

(Decided February 1, 1921.)

Appeal from Taylor Circuit Court.

1. **Appeal and Error—Matters Appearing of Record—Regularity of Proceedings—Presumption.**—Where there is nothing in the record of a road proceeding to show that the order of the county court selecting the route recommended by the viewers was entered in vacation, it will be presumed that the order was entered at the proper time.
2. **Highways—Proceedings for Alteration—Notice to Landowners Before Order is Entered Selecting Proposed Route.**—Under Kentucky Statutes, section 4301, providing that "if the court decides to undertake the proposed work, the county judge shall appoint a day for hearing the parties interested and cause notice thereof to be given to the proprietors and tenants of the property which would have to be taken or injured to show cause against the same," it is not necessary that the court should give such notice before selecting the proposed route. The order is merely interlocutory and subject to change after the hearing, and all that is necessary is, that those affected be given an opportunity to be heard.
3. **Highways—Proceedings for Alteration—Sufficiency of Report of Viewers on Disadvantages to Landowners.**—Under Kentucky Statutes, section 4301, providing that the viewers shall report in writing the advantages and disadvantages, which, in their opinion, will result as well to individuals as to the public from the proposed work, etc., a report by the viewers fixing the amount of damages to be paid to the landowners was a substantial compliance with the statute on the question of disadvantages.
4. **Appeal and Error—Highways—Proceeding for Alteration—When Point That Proposed Route Ran Through Orchard Cannot be Raised on Appeal.**—Where, in a proceeding for the alteration of a road, the viewers reported that the proposed route would not take any orchard or part thereof, and this statement was not contradicted by answer or exceptions, it is too late to insist for the first time in the Court of Appeals that the proceeding should be dismissed, because the evidence on another issue tended vaguely to show that the proposed route did pass through the edge of an orchard.
5. **Appeal and Error—Eminent Domain—Highways—Damages—Evidence.**—Where in a proceeding for the alteration of a road, witnesses for the landowners stated that the opening of the road would injure the remainder of their lands, the petitioners were entitled to rebut this evidence by showing that no injury would result, and the general statements by the witnesses, that the improvement would benefit the remainder of the land, cannot be regarded as prejudicial in view of the fact that the jury were told

to exclude from consideration any enhancement or benefit to the land not taken by reason of the opening or use of the road.

6. Appeal and Error—Highways—Eminent Domain—Damages—Question for Jury.—Where in a proceeding for the alteration of a road the evidence of the landowners showed that the damages were in excess of the amount fixed by the jury, while the evidence of the petitioners showed that the damages were even less than those allowed, the question was for the jury, and it cannot be said that its finding was flagrantly against the evidence.
7. Appeal and Error—Errors Claimed By Appellee Not Reviewable.—That part of a judgment making the county liable for costs in a road proceeding cannot be reviewed on appeal, where the county is an appellee and does not prosecute a cross appeal.

H. S. ROBINSON and S. A. RUSSELL for appellants.

H. W. RIVES for appellees.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

On April 3, 1916, C. V. Heistand and twenty-nine other landowners in the Merrimac precinct of Taylor county filed in the Taylor county court their petition for a change of the county road from Tallow creek to Merrimac. At the April term, viewers were appointed who filed their report at the subsequent May term. At the July term, Sarah M. Vaughan and E. N. Tucker filed a demurrer to the petition and a demurrer and exceptions to the viewers' report. At the same time they filed a petition signed by forty persons protesting against the establishment of the road. On July 17th the county judge entered the following order: "Upon examination of the different routes reported by the viewers herein, the court selected the route recommended by the viewers, and notice summons is ordered to issue against each of the parties over whose land the proposed change of the road is located." On August 7th, Mrs. Vaughan and Tucker moved the court to set aside the order of July 17th, and also filed additional exceptions to the report of the viewers. The court held that it would hear all the evidence in the case before passing upon the questions raised by the exceptions. The petitioners then introduced their evidence, but Mrs. Vaughan and Tucker declined to offer any evidence. Thereupon the court overruled the demurrer to the report of the viewers and all exceptions thereto, and decided that the proposed alteration should be undertaken on behalf of the county. Not

being able to reach an agreement with Mrs. Vaughan and Tucker as to the amount of compensation, he appointed three commissioners to assess the damages. During the same month the commissioners filed their report allowing Mrs. Vaughan \$200.00 and fencing for both sides of the road over her land, and E. N. Tucker \$50.00 and fencing for both sides of the road over his land. Mrs. Vaughan and Tucker then filed exceptions to the commissioners' report. Exceptions were overruled except as to the amount of damages. The trial before a jury on the question of damages resulted in a verdict for Mrs. Vaughan of \$200.00 and no fencing, and E. N. Tucker \$50.00 and no fencing. Judgment was entered accordingly and Mrs. Vaughan and Tucker prosecuted an appeal to the circuit court. Their motions to quash the report of the viewers and the report of the commissioners, as well as to set aside the order entered by the county judge on July 17th, were overruled. A trial before a jury resulted in a verdict of \$160.00 for Tucker and \$500.00 for Mrs. Vaughan. Mrs. Vaughan and Tucker appeal.

It is first insisted that the order of July 17th, 1916, reciting that the court had selected the route recommended by the viewers, and directing that process issue against the landowners, is void because made in vacation. In reply to this contention it is sufficient to say that there is nothing in the record before us to show that the order was entered in vacation, and it will be presumed, in the absence of such showing, that the order was entered at the proper time.

In the same connection it is argued that the order of July 17, 1916, should not have been entered at all until the appellants were given an opportunity to be heard. The statute does not so provide. On the contrary, it distinctly provides that "if the court decides to undertake the proposed work, the county judge shall appoint a day for hearing the parties interested, and cause notice thereof to be given to the proprietors and tenants of the property which would have to be taken or injured to show cause against the same, etc.," section 4301, Kentucky Statutes, thus clearly showing that the court should first select the proposed route and then notify the landowners affected to show cause against it. A contrary view of the statute would make it necessary for landowners to go to the expense and trouble of show-

ing cause against a proposed alteration, which the court might never intend to approve. Of course, the order making the selection was merely interlocutory and subject to change after the hearing. Not only were appellants served with process, but they appeared in court at the time fixed for the hearing and offered no evidence contradicting that introduced by the petitioners. Thereupon, all the exceptions filed by appellants were overruled, and the court then entered an order adjudging that the proposed alteration be undertaken on behalf of the county. Thus the order did not become final until appellants were afforded an opportunity to be heard.

Another contention is that the report of the viewers did not set forth the disadvantages which would result to appellants from the proposed alteration as required by section 4301, Kentucky Statutes. The report of the viewers does show that they surveyed the proposed route and another route, and rejected two other routes as impracticable. They reported in favor of the proposed route because it was nine hundred feet shorter than the other route surveyed, and was out of the way of high water. Their report further shows that a better road could be built along that route, that it would accommodate more of the traveling public, and that it was necessary for the alteration to be made because the old road lay in the bed of Robinson creek almost its entire distance, and in time of high water could not be traveled. It also gave the names of the landowners whose land would be taken, and stated that Mrs. Vaughan would require about \$150.00 compensation and E. N. Tucker about \$50.00 compensation. It is very evident that the viewers did not believe that Mrs. Vaughan and Tucker would suffer any disadvantages other than those resulting from the taking of the land itself, and having specified the amount of damage, we think there was a substantial compliance with the statute.

The point is also made that the proceeding should be dismissed because the evidence shows that the proposed road would pass through Tucker's orchard. The viewers reported under oath that it would not be necessary to take any burying ground, garden, yard, orchard or part thereof, or injure or destroy any building. This statement of fact was not contradicted by the answer, or by any of the numerous exceptions filed by appellants.

In testifying on the question of damages to the balance of his land, E. N. Tucker said: "It runs right through the edge of the orchard too." Not having raised the question below either by answer or exceptions, it is too late to insist for the first time in this court that the proceeding should be dismissed because the evidence heard on another issue tended vaguely to show that the proposed road did pass through the edge of an orchard.

Another ground urged for reversal is that the court erred in permitting witnesses for appellees to state that the construction of the road would benefit and not damage the residue of appellants' lands. In support of this position it is argued that the admission of the evidence complained of violated the rule laid down in *Broadway Coal Mining Co. v. Smith, &c.*, 136 Ky. 725, 125 S. W. 157, that benefits to the land not taken cannot be set off against damages either for the land actually taken or for injury to the remainder of the land. Since the witnesses for appellants stated that the opening of the road would injure the remainder of the land, it is clear that appellees were entitled to rebut this evidence by showing that no injury would result, and the general statements by the witnesses that the improvement would benefit the remainder of the land cannot be regarded as prejudicial, in view of the fact that the jury were told to exclude from consideration any enhancement or benefit to the land not taken by reason of the opening or use of the road.

Lastly, it is contended that the verdict fixing the amount of damages is flagrantly against the evidence. The evidence for appellants tended to show that the damages were in excess of the amount fixed by the jury. On the other hand, there was evidence that the damages were even less than those allowed. Under these circumstances the question was for the jury, and we are unable to say that its finding was flagrantly against the evidence.

On the whole we find no error in the record prejudicial to the substantial rights of appellants.

In the absence of a cross appeal by appellee, Taylor county, we are not at liberty to review that part of the judgment making the county liable for the costs of the proceeding.

Judgment affirmed.

Bryant v. Commonwealth.

(Decided February 1, 1921.)

Appeal from Laurel Circuit Court.

1. **Taxation—Failure to Assess Land—Forfeitures and Penalties.**—In an action under the provisions of article 111, chapter 108, Ky. Stats., for the forfeiture of titles to lands, for the non-assessment and non-payment of taxes, and the owners and claimants are unknown to the Commonwealth's attorney, and the defendants to the action are designated as "unknown owners and claimants," and the proper warning order and publication are made as required by the statute, *supra*, the owner or claimant of a title to the lands, has a right to file answer and resist the forfeiture of his title or claim.
2. **Taxation—Failure to Assess Land—Forfeitures and Penalties.**—In a proceeding under article 111, chapter 108, Ky. Stats., for the forfeiture of title to lands because of the non-assessment and non-payment of taxes thereon, the court is not required to adjudicate upon the validity of the title of a claimant, nor is the Commonwealth's attorney authorized to make an issue between the Commonwealth and a claimant as to the validity of the claimant's title; nor will the court be required to adjudicate as between the titles of different claimants, until after a judgment of forfeiture has been rendered and counterclaims are filed by claimants desiring to redeem the titles forfeited, as provided by section 4076e, Ky. Stats.
3. **Taxation—Forfeitures and Penalties.**—In a proceeding under article 111, chapter 108, Ky. Stats., before a judgment of forfeiture is rendered, the only issues are between the Commonwealth and the owners or claimants of titles, and the issue relates, alone, to the question, whether the title or claim of an owner or claimant is liable to forfeiture for the non-assessment and non-payment of the taxes.

STEPHENS & STEELY for appellant.

G. I. RADER and H. C. CLAY for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.

This action was instituted in the name of the Commonwealth of Kentucky, by the Commonwealth's attorney, for the 27th judicial district, wherein Laurel county is situated, to secure a forfeiture of the titles of the unknown owners and claimants, who claim title under and through a patent granted to one William Mor-

gan on the 26th day of October, 1815, for 640 acres of land, which is situated in that county, for the failure to list for taxation, and the non-payment of taxes upon the land for each year since and including the year 1899. The land was properly described in the petition and a copy of the patent, upon which the title and claims sought to be forfeited were alleged to be based, was filed with the petition. In the caption of the petition, the defendants are described as the "unknown heirs at law, unknown devisees, and unknown vendees of William Morgan . . . and the unknown owners and claimants of the tract of land and all of whom are sued as unknown defendants herein." A warning order was made against the same styled defendants and an attorney was appointed for them, who reported as to the same defendants. Afterward an amended petition was filed which named and styled the defendants the same as in the original petition in the caption thereof, and in addition named Beatty, Henderson, Eve, Letcher and Herndon and the "Unknown heirs, unknown devisees and unknown vendees" of each of them, as defendants and the "Unknown owners and claimants" of the land were made defendants. In the petition, while it was alleged that William Morgan never sold or conveyed the land to any one, but died the owner of it, it described the persons designated as heirs of William Morgan as being his descendants, but referred to other persons designated as "unknown owners and claimants" as persons "claiming the aforesaid land . . . under or through the said patentee," and further reference is made to the defendants as "unknown owners, unknown claimants . . . and unknown vendees of said William Morgan" and avers that the described persons are the owners and claimants of the land. In the amended petition, however, it is averred that the allegation that William Morgan never made any conveyance of the land was a mistake, and then alleges that Morgan on the 16th day of March, 1819, sold the land and by deed conveyed it to Martin Beatty and Lillian Henderson, who thereafter conveyed an undivided one-half of it back to William Morgan, and reserved or attempted to reserve $1/12$ th of it for Joseph Eve, an undivided $1/8$ th of it for Robert Herndon, and for Robert Letcher an undivided $1/12$ th of the land. It is then alleged in the amended petition that after the making of the deed by Beatty and Henderson to Morgan, that

neither Morgan, Eve, Herndon, Letcher, Beatty or Henderson or the heirs or devisees of either of them, or any person claiming through or under either of them ever sold or conveyed any interest in the land to any other person.

The appellant, Roberta S. Bryant, offered an intervening petition to be made a party to the action in which she alleged that she was a necessary party to its proper determination; that she was the owner and claimant of the land under the title created by the patent to William Morgan; that Morgan sold and by deed conveyed to E. C. Farris, the undivided one-half interest in the land, which was conveyed to him by Beatty and Henderson, and that she had become the owner of same, and that she claimed to be the owner of same, and had title thereto through the patent to Morgan, and the deeds from Morgan to Beatty and Henderson and from Beatty and Henderson to Morgan, and from Morgan to Farris, and that she had, also, acquired and was the owner of the interests in the land, which Beatty and Henderson did not convey in the deed, which they made to Morgan, etc., and as such owner and claimant, she and her predecessor in title had listed the land for taxation and had paid all the taxes assessed against it for each of the years for forty years previous to the bringing of the action. She denied that she had failed to list the land or had failed to pay the taxes upon it for either of the years alleged in the petition and amended petition, and on account of which a forfeiture was sought. She, also, pleaded and relied upon the five years' statute of limitations provided by section 4076i, Kentucky Statutes, in bar of any forfeiture of her title, because of any failure to list the land and pay the taxes for any years, preceding five years before the bringing of the action.

The intervening petition was permitted to be filed and being treated as her answer, the Commonwealth's attorney filed a reply thereto, denying that appellant had any title to more of the land, than an undivided one-half, and alleging that one of the deeds, which constituted her claim of title to that portion of the land was a forgery.

Thereafter the court sustained a motion made by the Commonwealth's attorney, to strike the pleading of appellant from the record, and thereafter rendered a judgment declaring the claim and title of Morgan, Beatty, Henderson, Eve, Herndon and Letcher, and each of

them, as well as the title of their "unknown heirs at law, unknown devisees and unknown vendees," and the titles of the "unknown owners and claimants" of the land, through or under the patent to Morgan or by virtue of mesne conveyances between him and the claimants and owners, to be forfeited to the Commonwealth of Kentucky.

The judgment appealed from was that striking the answer of appellant from the records and denying her the right to file an answer and present a defense to the forfeiture of her claim and title.

Upon what ground the court based its action in denying to a claimant of title to land, the right to interpose a defense to an action, seeking a forfeiture of the title under which she claims is not stated, but it is suggested, in the brief of counsel for appellant, that the court was actuated by the doctrine that in actions of this character, there could be no adjudication concerning the validity or superiority of titles between adversary claimants. That in a proceeding of this kind, the court is not required to determine the validity of the title of any claimant to land, or who, among the claimants has the superior title, nor that the Commonwealth through its attorney is either authorized or required to contest the validity of the title or claim of title made by any one to the land, can not be disputed, *Bronaugh v. Com.*, 188 Ky. 103, but, as will be shown that principle will not sustain the judgment appealed from. In the cited case, as well as others, and especially in *Eastern Kentucky Coal Lands Corporation v. Com.*, 127 Ky. 767, it has been held, that under the act of 1906, being sections 4076b to 4076k, inclusive, Kentucky Statutes, it was the duty of every one claiming title to land, to list it for taxation and to pay the taxes thereon, whether his title was valid or invalid, and such duty, he must perform, or else suffer the forfeiture of such title to the land, as he has, to the Commonwealth. Hence, in a proceeding of this kind, before a judgment of forfeiture, it is no concern of the court, whether the title sought to be forfeited is good or bad. Its only concern is that a title or claim of title exists on the part of the defendants, or one or more of them and whether or not their laches in listing the land and paying the taxes has made their title or claim of title subject to forfeiture. Neither is the Commonwealth's attorney authorized to make an issue with any owner or claimant

of land, whose title is sought to be forfeited, as to the validity or invalidity of his title or claim, or as to its superiority over the title of another claimant. Nor before the judgment of forfeiture can different claimants of land be permitted to litigate with each other the superiority of their titles. These doctrines, while sound, are not applicable to nor do they sustain the judgment appealed from. The issues, which can be made before a judgment of forfeiture are between the Commonwealth and each claimant of title, or between the Commonwealth and joint claimants of the same title. The issue is, whether the owner or claimant has listed the land for taxation, under his title or claim and paid the taxes thereon for the years, whereof a forfeiture is claimed. In such action, it may appear that one claimant under the title paper upon which is based the title proposed to be forfeited, has fully protected his title, from forfeiture, whether valid or invalid, and another claimant of title to the land from the same common source has suffered a forfeiture of his, and the court may adjudicate accordingly, without determining the validity of any of the claims of title, or the superiority of one over another. Under the provisions of section 4076e, *supra*, after a judgment of forfeiture has been rendered, one who would establish a right to redeem the property, must exhibit a valid title to it, but, a forfeiture of title necessarily works a substantial injury to the one owning or claiming a title, and a judgment declaring a forfeiture is not authorized unless the owner or claimant has been derelict, within the terms of the statute, and an owner or claimant, when sued is entitled to his day in court. The right of an owner or claimant to resist a judgment of forfeiture is fully conceded in *Bement v. Com.*, 186 Ky. 805, and *same v. same*, 172 Ky. 452. That portion of section 4076d, *supra*, which is as follows:

“The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to, and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other in-

strument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff," requires, that an owner or claimant shall have a judicial determination, as to whether the facts exist which authorize a forfeiture of his title or claim of title, and may contest the truth of the alleged grounds upon which it is sought. Section 4076d, *supra*, requires, that, when the owners or claimants are unknown, they may be sued under the designation of "unknown owners and claimants." Among the defendants named in the caption of the petition and amended petition were the unknown owners and claimants of title to the land. The prayer of both petition and amended petition was for a forfeiture of the title of each and all of the defendants. The Commonwealth may elect to proceed for a forfeiture of the title or claim of title to land, of any one, it chooses, without disturbing the title or claim of another and without affecting the latter's title, but, when so attempting the pleadings should be so drawn, as to definitely show, what claim or title is sought to be forfeited, and so that the title or claim of another may not be endangered by the judgment, and in the present instance, while all the "unknown owners and claimants" to the title to the land, under or through, Morgan, Beatty, Henderson, Eve, Letcher and Herndon, are made defendants to the action and a prayer for the forfeiture of all their claims, an attempt seems to have been made in the pleadings to limit the "unknown owners and claimants," to such persons, as claim title to the lands by devise or by inheritance, and to raise an issue of fact, with any one of such "owners" or "claimants," as claim title under the Morgan patent by conveyance, but, the terms of the pleadings are such as to include all such claimants, and the court evidently so construed it, as the judgment declares the titles of all such to be forfeited and would be a bar to the claim of any owner or claimant, who might thereafter desire to insist upon his title, in any other controversy concerning the land. Hence, the appellant who under the designation of an "unknown owner and claimant," was a party defendant, to the action, and should have been permitted to show by pleading and proof, that her claim of title was not subject to forfeiture, and it was error to strike her answer from the record, and refuse to permit her the right

to defend the action, as far as it related to her title or claim of title.

The judgment is therefore reversed and cause remanded for proceedings not inconsistent with this opinion.

Ison v. Commonwealth.

(Decided February 4, 1921.)

Appeal from Letcher Circuit Court.

1. **Criminal Law—Instructions.**—Where there is no fact or circumstance in the record to show or indicate that defendant in a criminal prosecution acted under his right of self-defense it is not error for the court to refuse an instruction submitting to the jury that defense.
2. **Assault and Battery—Criminal Responsibility—Discretion.**—The common law offense of assault, or assault and battery is punishable under that law by an unlimited fine, or unlimited imprisonment in the county jail or workhouse or both, within the sound discretion of the jury or court trying the case, and that punishment has not been altered by any statutory provision in this Commonwealth. So that the only limitation thereon is that under the facts the punishment should not be so severe as to be "cruel and unusual" within the constitutional sense, and not in plain violation of the discretion to be exercised in its infliction.
3. **Assault and Battery—Amount Awarded.**—The assault and battery inflicted in this case was cruel, severe and humiliating. It was wholly unprovoked and committed by a young, stout man upon an old enfeebled one. A fine of \$500.00 and ninety days' imprisonment in jail is held not to be excessive.

DAVID HAYS and MORRIS & JONES for appellant.

CHAS. I. DAWSON, Attorney General, and W. P. HUGHES, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

Appellant and defendant in the indictment, Hiram Ison, was convicted in the Letcher circuit court of the offense of maliciously and unlawfully assaulting John Day and the punishment imposed by the verdict was a fine of \$500.00 and confinement in the county jail for 90 days. His motion for a new trial was overruled and he prosecutes this appeal complaining (1) that the verdict is so severe and excessive as to be entirely unwar-

ranted by the evidence, and (2) that the court improperly declined to instruct the jury on defendant's right of self-defense.

It is apparent that the determination of each of the contentions calls for an examination of the evidence heard upon the trial, since unless they find support therein they can not be sustained; while on the other hand if the evidence sustains them the judgment should be reversed.

In disposing of the two grounds together, as we have concluded to do, it will first be necessary to make a brief statement of the substantial facts as appear from the testimony and of which there is no material contradiction found in the record. Bony Ison and John D. Day were joint defendants in the indictment with appellant and they were also convicted, but the court granted to each of them a new trial. Bony Ison is an uncle of appellant and his other co-defendant, John D. Day, is his first cousin. Harve Ison is also an uncle of appellant and John Day, the person assaulted, and his son Billy Day lived some two or three hundred yards from the residence of Harve Ison and on the latter's farm. Some time before the day of the assault John Day, appellant's victim, testified for the Commonwealth in a prosecution charging appellant with violating the fish and game law, wherein he was accused of gigging fish contrary to the provisions of that law and in which prosecution the appellant was convicted and fined \$20.00. On the occasion of the assault Billy Day preceded his father a few minutes on a trip to a well in Harve Ison's yard to get a bucket of water and about the time he had drawn the water from the well and filled his bucket his father, John Day, who was engaged in a similar errand, appeared at the front gate of Harve Ison's place and his son halted him at the gate and offered to fill his bucket with water without the old man coming into the yard, since appellant and Bony Ison, who were in the house of Harve Ison, or about the front door, had been talking about the father in somewhat of a threatening and belligerent manner. About the time the son drew the water for his father and filled his bucket appellant discovered the presence of the father at or near the gate but on the outside of the yard and he immediately started towards him, saying that he intended to whip or beat \$20.00 worth

out of the old man since the latter had caused him to pay out that sum on the "fishing scrape." The old man began to beg and plead and stated that he wanted no trouble and that in the "fishing scrape" trial he had testified to nothing but the truth, but these importunities had no deterring effect on appellant; on the contrary they appeared to have rendered him more determined in his announced purpose. He went over the yard fence into the road where the old man was and the latter moved backwards, still pleading with appellant, and finally he picked up two rocks but made no demonstration to use them and continued to move backward, saying in substance to appellant that unless the pursuit was abandoned the rocks would be used. About that time Billy Day endeavored to go to the rescue of his father, but Bony Ison at first grabbed him and held him and a little later drew a 32 Winchester rifle on him and forced him to leave the premises. Bony Ison then drew the gun on old man Day and made him drop the rocks which he had picked up and which he had never endeavored to use, and the appellant, who was a young, vigorous, stout man accosted his victim, who was more than three score years of age, and gave him a sound beating, kicking him in the side, breaking one of his ribs and otherwise bruised his body, not desisting until Harve Ison forced him to do so. The bruised victim then obtained his bucket of water to go home but the appellant forced him to take along a bucket of slop that was nearby, and as the old man was departing appellant administered to him several more kicks as a parting salute and for good measure. The foregoing narration is in brief the testimony of the Commonwealth's witnesses and it is in all of its essentials practically admitted by appellant and his witnesses. He states that he was angry at John Day for testifying against him in the prosecution referred to and that he had threatened and intended to whip him for having so testified. He admits getting over the fence, going out of the yard and into the road where his victim was and pursuing him for thirty or forty feet before he was overtaken and before the whipping occurred. No one says that old man Day in any manner struck or offered to strike appellant with the rocks, his fist or anything else. The only excuse which appellant pretends to give for pursuing his victim was that he was afraid the latter might use the rocks which

he had picked up if the pursuit was abandoned, and which contention is in the face of the fact that the old man was retreating and all the while disclaiming any desire for trouble. Appellant's contention in its last analysis comes to this, that if one desires to wreak vengeance against another and the latter has in his possession a weapon which he might use in defending himself it is lawful for the former to dispossess the latter of such weapon in order that he might the more successfully accomplish his revenge, and in disarming his victim he may call the assistance of a willing confederate with a Winchester gun and each of the two will be excused under the sacred right of self-defense. The position of appellant and his counsel, we must acknowledge, calls for a new application of the right of self-defense, and one which we have not met or been informed of in nearly thirty years' practice. It has been our understanding that the right could only be invoked when the accused committed his offense to prevent the infliction upon himself, or another, of death or great bodily harm at the hands of the assailant producing the danger, and which danger was then and there immediately pending, or the accused in the exercise of a reasonable discretion believed and had reasonable grounds to believe was immediately pending. It has never been applied where the danger was potential only or might arise in the future, or where the accused by his own wilful conduct created the danger and did not in good faith withdraw from the difficulty. This court has in a number of cases upheld the action of the trial court in refusing the self-defense instruction when the evidence did not authorize it. *Taylor v. Houser*, 12 Bush 465; *Commonwealth v. Rudert*, 109 Ky. 653; *O'Hara v. Commonwealth*, 164 Ky. 403; *Owens v. Commonwealth*, 187 Ky. 207, and *Gregory's Criminal Law*, section 112.

Being thoroughly convinced that the testimony shows the entire absence of any facts upon which the right of self-defense upon the part of appellant could be predicated the court did not err, under its duty to instruct the jury upon the entire law of the case, in refusing to give the self-defense instruction.

Neither can it be said that the punishment is excessive under the facts of this case. The offense of which appellant was convicted is a common law misdemeanor with no punishment fixed by statute. Under the common

law the punishment was a fine in any amount, or imprisonment in jail for any length of time, or both in the sound discretion of the jury or court trying the case. That punishment, limited only by a reasonable discretion in the light of the facts, still prevails with us. If the punishment inflicted is not so excessive in the light of the facts as to invade some constitutional right against "cruel and unusual punishment" it will not be disturbed. *Chandler v. Commonwealth*, 1 Bush 41; *Cornelison v. Commonwealth*, 84 Ky. 583, and *Ward v. Commonwealth*, 128 S. W. (Ky.) 72. Another interesting case analogous in principle is *Burgess v. Commonwealth*, 176 Ky. 326. The assault in the *Chandler* case was upon a woman committed for the purpose of taking from her the possession of her child. It did possess in favor of defendant one feature not found in the instant case, i. e., defendant therein denied the assault which is somewhat boastfully admitted in this case. The jury assessed a fine therein against defendant of \$1,500.00 and the court answering the contention that it was excessive said, "Nor can we admit that the alleged excessiveness of the adjudged fine can entitle the appellant to a reversal when the offense was so enormous, and for the public security required such exemplary punishment." A fine of \$400.00 was upheld as not excessive in the *Ward* case where there was no battery but only an assault accompanied with offensive language. The assault in the *Cornelison* case was no more severe than the one in the instant case though it was committed in a manner most humiliating to the one assaulted. The jury fixed the punishment therein at a fine of one cent and imprisonment in the county jail for three years, and this court declined to interfere with it on the ground of its being excessive. We do not regard the assault and battery in this case as any less aggravating and inexcusable than those found in the cases referred to. The only excuse for the unprovoked assault committed by appellant was the rancor which he harbored against his victim for performing a compulsory legal duty in testifying for the Commonwealth in the prosecution against him for violating the fish and game laws. We have not yet arrived at the point where one must be terrorized, threatened, assaulted and beaten for discharging his duty as a good citizen in response to the process of the courts issued in the enforcement of the laws of the Com-

monwealth. In the light of the facts appellant has no ground to complain that the verdict is excessive.

Finding no error prejudicial to the substantial rights of appellant the judgment is affirmed.

Sovereign Camp Woodmen of the World v. Hornung.

(Decided February 4, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas, Fourth Division).

1. **New Trial—Time for Application.**—A motion for a new trial must be made at the term in which the verdict or decision is rendered and within three days thereafter unless unavoidably prevented, and this means three days after the entry of record of the verdict of the jury, or the decision of the court when the jury is waived and the law and facts submitted to the court; and does not mean three days after the rendition of the judgment upon the findings of fact either by a jury or by the court.
2. **New Trial—Review.**—In order to enable this court to review errors occurring at or during the trial, held by the court without the intervention of a jury, a motion for a new trial is necessary.
3. **New Trial—Time for Application.**—The requirement of section 342 of the Code as to the time within which the motion for a new trial should be made is mandatory, and unless made within the required time the only question before this court on appeal is whether the pleadings sustain the judgment.
4. **Appeal and Error—New Trial.**—Record examined and—Held that the motion for a new trial in this case was not made in time nor was defendant unavoidably prevented from doing so.

ROBT. L. PAGE and L. D. GREENE for appellant.

ISAAC SHERMAN for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellant and defendant below, Sovereign Camp Woodmen of the World, on November 9, 1904, issued and delivered its beneficiary certificate to A. William Hornung (whom we shall refer to as the insured), who was the husband of the appellee and plaintiff below, Benea Hornung, who was made the beneficiary therein, and in the certificate defendant agreed to pay, on certain conditions, to the beneficiary upon the death of the insured occurring after two years from the date of the certificate, the sum of \$1,000.00 and the further sum of

\$100.00 for the purpose of erecting a monument at the grave of the insured, who died while residing in Louisville, Ky., on January 16, 1917. There was a local camp of the defendant in Louisville, known as Powell Camp No. 9, Woodmen of the World, to which the insured belonged and to the clerk of which the monthly assessments and lodge dues (aggregating \$1.60) it is admitted were paid up to September 1, 1916, and we think there can be no doubt from the evidence that they were paid to December first of that year. After insured's death defendant declined to pay any part of the amounts stipulated in the certificate and plaintiff brought this suit to compel it to do so, alleging, among other things, that the insured in his lifetime had complied with all of the requirements and conditions contained in or attached to the certificate and was at the time of his death a member in good standing entitling plaintiff to the relief sought. The answer was a general denial of the averments of the petition, including one that the insured "duly paid all assessments and dues that had been levied against him" by defendant while he was a member of the order; and denied that the certificate sued on was in full force and effect at the time of the insured's death. At the trial a jury was waived and the law and facts were submitted to the court, who tried the case on April 22, 1918. Time was taken, and the court did not render its opinion containing its findings of fact and law until October 12, 1918, upon which day the decision of the court in favor of plaintiff was filed and entered of record. No judgment was rendered at that time, but one was rendered four days thereafter giving plaintiff judgment for \$1,100.00 interest and cost, and to reverse it defendant prosecutes this appeal.

The chief grounds relied on and the only ones possessing any conceivable merit are: (1) The failure of the court to permit competent evidence offered to be introduced by defendant, and (2) that the decision of the court upon the issues of fact presented by the pleading is not sustained or supported by the evidence, but for reasons hereinafter disclosed we do not deem it necessary to determine the merits of either of the grounds urged.

It is the settled practice in this jurisdiction, established by a long line of cases from this court, that in the absence of a motion for a new trial, or one filed in due

time, the only question presented to this court on appeal is whether the pleadings are sufficient to support the complained of judgment. *Ruhrwein v. Gebhart*, 90 Ky. 147; *Boyle v. Stivers*, 109 Ky. 253; *Farmer v. Bank of Wickliffe*, 21 Ky. L. R. 468; *Seiler v. Gilley Brothers & Co.*, 32 Ky. L. R. 1275; *Witt v. L. & E. R. R. Co.*, 158 Ky. 401; *Johnson v. Boggess*, 179 Ky. 649, and *Puckett v. Morris*, 181 Ky. 374. It is equally essential for the purpose of obtaining on appeal a review of errors, other than defects in the pleadings, that a motion for a new trial be filed in proper time when the case is tried by the court (the jury being waived) as when the issues are determined by the verdict of a jury. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678; *Imperial Fire Insurance Co. v. Kiernan*, 83 Ky. 468, and numerous other cases following them.

Section 342 of our Civil Code of Practice requires that motions for a new trial must be made at the term in which "the verdict or decision is rendered" and, except for the single ground of newly discovered evidence, the motion must be made "within three days after the verdict or decision is rendered, unless unavoidably prevented." In a number of the cases, *supra*, it is expressly held that it is "imperative" that the motion should be made within the three days provided by that section of the Code. This is tantamount to holding that the requirement for the motion to be made at the same term and within three days from the rendering of the verdict or the decision of the court is mandatory, and in the *Seiler* case, referred to, it is expressly held that, "This provision (section 342) of the Code is mandatory." It is also well settled that the time for making the motion accrues upon the return of the verdict of the jury into court or, if the case is tried without a jury, when the court renders its decision upon the facts; or differently stated, the motion must be made within three days after the return of the verdict or the decision by the court upon the facts and not within three days after the judgment of the court pronounced upon the verdict or the court's decision. *Imperial Fire Insurance Co. v. Keirnan*, *supra*; *Boyle v. Stivers*, *supra*; *Ruhrwein v. Gebhart*, *supra*, and *The McCormack H. M. Co. v. Harned*, 7 Ky. L. R. 139, (an opinion by Judge Richards of the Superior Court). In the *Kiernan* case the verdict was returned on January 13, 1883, but no judgment was rendered

thereon until May 7, 1883. A motion for a new trial was filed the next day, May 8th, but the court held that it was too late, since it should have been filed within three days from January 13th, when the verdict was returned and that the time of the rendition of the judgment could not be considered in the determination of the question. In the Gebhart case, immediately upon the return of the verdict of the jury a motion *non obstante veredicto* was made by the defendant which was not acted on until after five days, after which a motion for a new trial was filed and the court held that it came too late and that the pending motion for a judgment notwithstanding the verdict did not suspend the time within which the motion for a new trial should be made.

With these principles of practice well settled it becomes necessary to examine the record in this case and determine whether defendant's motion for a new trial was made and entered within the time required by the Code as interpreted by the opinions, *supra*. The motion was not filed until November 16, 1918, one month after the rendition of the judgment, and one month and four days after the decision of the court upon the issues of fact involved, which we have seen is equivalent to the verdict of a jury. On the same day defendant entered motion to set aside the judgment entered on October 16, 1912, upon the grounds, as claimed, that it had been filed by plaintiff's attorney secretly and without knowledge on the part of defendant or its attorneys that it would be filed, and that the day upon which it was filed was not a juridical day or one when the court was in session and that defendant's attorneys did not learn of its being filed until November 13, 1918, when the court was still in suspension pursuant to an order to that effect. Such order was entered because of the prevalent influenza epidemic, and because it was necessary to enable attorneys to assist in necessary war work. The record discloses that on October 12, 1918 (the same day the court rendered its decision), at the request of the county health authorities, the sessions of the civil divisions of the Jefferson circuit court were "postponed until November 2, 1918;" that on October 26 an order was entered, concurred in by all the judges in the Jefferson circuit court, directing that a joint session be held on November 2, 1918, but that jury trials be postponed until November 11, 1918; and on November 6 an order

was entered postponing the sessions of the civil divisions of the Jefferson circuit court until November 23, 1918, in order to enable the members of the bar as well as the judges to assist in necessary war work. It is contended by counsel for defendant that because of the orders referred to no session of the court trying this case was held after October 12 until some time after the motion for a new trial was made (November 16th), and that the second one made on January 13, 1919, two days after the re-entry of the judgment on the court's findings of October 12, 1918 (the judgment of October 16, 1918, having been set aside), was within time so as to enable us to consider the errors relied on for a reversal of the judgment.

It is extremely doubtful whether the sessions of the court and its conduct of all business (except the trial of cases) was ever suspended after October 12, 1918, so as to prevent the filing of a motion for a new trial. Indeed it appears that various orders were made in sundry cases day after day, and the only regular business of the court actually suspended was the trial of cases. But, be this as it may, it is affirmatively shown that only *jury* trials were suspended after November 2 till November 11, 1918, and that the court was in session for motions, orders and for all other purposes (except jury and perhaps other trials) on November 2 till November 6, constituting at least four juridical days after the one of October 12, upon which the decision of the court was rendered, and within three days of which the motion for a new trial should have been filed. If we eliminate all of the intervening days between October 12 (within three days from which the motion was due) and November 2, and the days following November 6 till November 23, there still appears more than three juridical days when the court was open for the transaction of business and within which the motion for a new trial could be legally filed. The attorneys for defendant had knowledge of the decision of the court rendered on October 12 and one of them endorsed the judgment which was filed on October 16, 1918, but it is due him to say that he claims that he did not agree for it to be filed until it had been submitted to his co-counsel, which the latter says was never done, but he states in an affidavit filed by him, "that ever since the 12th of October, 1918, this affiant has been watching this action and has been

waiting for a judgment to be presented for approval by plaintiff's attorney," and that he "did not anticipate any step to be taken in this action until the 2nd day of November, 1918." Notwithstanding this he says he did not discover the judgment of record until November 13, 1918, although, as we have seen, the court was in session four days between November 2 and November 6.

The orders in this case with reference to the holding of court and suspending its business, or a part of it, were all upon the record and made at the time and place prescribed by the practice of the court, and we find nothing in the record "unavoidably" preventing the filing of the motion for a new trial within time. The *prevention*, to be "unavoidable" within the meaning of the section, must be something more than a failure to take notice of the sessions of the court. We need not attempt a concrete definition here, since it is sufficient to say that the facts in this record do not bring defendant within the excusing provision of section 342 of the Code.

We therefore conclude that the motion for a new trial was not filed within the time required by law and that the court erred in permitting it to be filed and treating it as timely made, which conclusion leaves only for consideration the sufficiency of the pleadings to support the judgment. Their sufficiency for that purpose is not questioned, as indeed it could not be, and the only alternative, under the rule of practice announced by the cases, *supra*, is to affirm the judgment, which is accordingly done.

Pugh v. Eberlein.

(Decided February 4, 1921.)

Appeal from Laurel Circuit Court.

1. Trial—Instructions.—Brevity in statement and clarity of expression should be employed in the drafting of instructions.
2. Trial—Conduct of.—Courts should disregard such errors or mistakes as do not affect the substantial rights of the complaining party.
3. Appeal and Error—Instructions.—Inaptness of statement is not a reversible error where the instructions given are substantially correct.

4. **Appeal and Error—Instructions.**—Instructions if not prejudicial will not authorize a reversal unless so contrary to law and the evidence as to bring about an unjust verdict.

H. C. CLAY for appellant.

GEO. G. BROCK for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Recovery on a note for \$1,000.00 was the relief sought in this action by the appellee. In the original petition judgment was asked against appellant individually and as trustee, but on motion, appellee elected to prosecute the action against appellant individually. Though the note was signed "W. A. Pugh, Trustee," it was alleged the maker was to be bound personally and not otherwise. This was denied in the answer, the defense being that appellant had executed the note as trustee for his grandchildren and it was so understood by the appellee. The note was executed in payment of stock in a motor car company. A jury having found against appellant, he has prosecuted this appeal. A reversal is asked on the sole ground that the instructions given were erroneous.

Two of the three instructions are quite long and we see no reason for incorporating them as a part of the opinion as no special good would be accomplished and no useful purpose served by so doing.

It is said the instructions are confusing, misleading and inconsistent, but we do not think they are objectionable for any of said reasons. While brevity in statement and clarity of expression should be the court's aim in drafting instructions, it does not follow that instructions void of these attributes are erroneous. The greater the length the more difficulty is usually experienced by jurors in understanding them.

Instructions should be predicated upon the issues made by the pleadings and competent evidence introduced at the trial. This the lower court endeavored to do. Under the first instruction, the jury could not have found for the appellee unless they believed the note, though signed as trustee, was in fact the individual obligation of appellant. This was the issue before the jury, and their verdict manifests the conclusion there was no understanding or agreement that appellant executed the note in any other than his individual capacity,

a conclusion warranted by the pleadings and the evidence.

The second instruction submitted appellant's side of the controversy and by it the jury was told that if the note was executed and delivered by appellant as trustee for his grandchildren and so accepted by appellee and not as the individual obligation of appellant, they should find for the latter.

In the third instruction the court submitted an issue raised by the answer as to the alleged false statements and misrepresentations made by appellee as an inducement to the purchase of the stock.

We think the instructions fairly submitted the issues to the jury. They were inaptly drawn, but the lower court during the progress of the trial has not the time to prepare instructions with that precision and exactness of thought and expression as might be expected when there is more time for study and deliberation.

It is easier to criticise than to construct; nor is it difficult with the lapse of time to find flaws and inaccuracies in things said and written whether in court, in business, the daily affairs of life or elsewhere. The courts should disregard such errors or mistakes as do not affect the substantial rights of the complaining party. Mere inaptness of statement in the instructions is not a reversible error, if they are substantially correct.

Instructions might be erroneous, but if not prejudicial there is no cause for complaint unless they are so contrary to law and the evidence as to bring about an unjust verdict.

Measured by the various rules of construction and tests applicable in such cases, we are unable to find grounds sufficient to justify or authorize a reversal of the judgment below and it is accordingly affirmed.

Linder, et al. v. Llewellyn's Admr., et al.

(Decided February 4, 1921.)

Appeal from Fayette Circuit Court.

1. **Wills—Limitation Over.**—Where there is an absolute devise of the whole estate, a limitation over by way of remainder of the undisposed of estate, is void.

2. Wills—Intention of Testator.—Testator's intention as gathered from what is written in the will as an entirety, will control where the intention so gathered does not conflict with some positive rule of law.

GEORGE C. WEBB and R. H. COLBERT for appellants.

SHELBY, NORTHCUTT & SHELBY and CHESTER D. ADAMS for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Reversing on original appeal and affirming on cross appeal.

This appeal brings in review the proper construction of the following will:

"I, Joseph H. Llewellyn, of Lexington, Fayette county, Kentucky, do make and declare this my last will and testament.

"I direct the prompt payment of my just debts and funeral expenses.

"I give and devise all of my property of every kind, real and personal, to my beloved wife, Emma H. Llewellyn, and whatever property may be remaining at her death, I wish the same equally divided between the children of my brother and sister, viz.: David H. Llewellyn and Mrs. Dovey M. Danks.

"I appoint my wife, Emma H. Llewellyn, executrix of this will and require no security from her.

"Given under my hand this September 11, 1915.

"JOSEPH H. LLEWELLYN.

"Signed in presence of

"Proviso—

"Providing for Mrs. Lucille Whittmore to have from three to five hundred dollars.

"JOSEPH H. LLEWELLYN.

"Jessie B. Long,

"Madge S. Atchison, March 31, 1916."

Joseph H. Llewellyn died in April, 1916, and his will was duly admitted to probate in that month. Testator left no children nor the descendants of any, but left surviving him a wife, Emma H. Llewellyn, and certain descendants of a deceased brother and of a deceased sister.

Emma H. Llewellyn, who qualified as executrix of the will, died in November, 1916, leaving surviving her a

sister, a brother and the descendants of a deceased brother. Due administration was granted upon the estates of both Joseph H. Llewellyn and his wife.

Joseph H. Llewellyn died seized of two pieces of real estate and some personalty; a portion of the latter was disposed of by his widow.

The question for decision is: Did testator give to his wife a fee in the property mentioned, or merely a life estate therein, with the power of disposition?

The heirs of testator claim the widow took only a life estate in the property, and the part remaining undisposed of at her death passed to them as devisees in remainder under the provisions of the will, and this was the view taken by the chancellor.

It is the contention of Mrs. Llewellyn's heirs, that the widow took a fee simple in the property and hence they are entitled to same.

Certain of the appellees have prayed a cross appeal from so much of the judgment as adjudges the testator's widow had, under the will, the full power of disposal of the whole or any portion of the devised estate.

Where there is an absolute devise of the whole estate (which carries with it the power of unlimited disposition), a limitation over by way of remainder of the undisposed of estate is void. On the other hand, where a life estate is devised, with power of disposition, a limitation over of the property remaining undisposed of at the death of the first taker is valid.

A limitation over of the remainder after the gift of the fee is void as being inconsistent with the estate granted.

The words of the will, "I give and devise all of my property of every kind, real and personal, to my beloved wife, Emma H. Llewellyn," clearly import an intention to convey to her an absolute estate in testator's property, and are sufficient to pass a fee simple title thereto. This being true, any attempted limitation over must be held void.

Appellees rely upon a line of cases of which *Commonwealth v. Manuel*, Exor., 187 Ky. 48, 208 S. W. 327, is an example. The will construed in that case contained eight clauses and, to use the language of the court, "is so inaptly worded and arranged as to leave in doubt what the testator intended by what he said."

When resort was had to the circumstances surrounding the testator at the time the will was written, the court said this doubt was removed. It is stated in the opinion that two girls reared by testator and his wife were closer and dearer to him than any others, with the exception of his wife, and they were the persons that might reasonably and naturally be expected he would desire as the beneficiaries of his estate after his wife's death. On the other hand, the relations between testator and his wife and the heirs-at-law (the adverse parties on the appeal), were never intimate or cordial. In the present record, there is an entire absence of circumstances such as confronted the court in the case, *supra*.

Great stress is placed by counsel on the statement in the Manuel case, that the most prominent and controlling rule in the construction of wills is that the testator's intention, as gathered from what is written in the whole instrument, is controlling where the intention so gathered does not conflict with some rule of law.

Judging the intention of Joseph H. Llewellyn by what he said, that is as gathered from the meaning of the words employed by him in his will, and this is the consideration that must control us, but one conclusion can be reached, namely, that his wife was given the fee to the property mentioned. A contrary construction would violate the very rule contended for by appellee as expressed in the Manuel case, since there can be no limitation over of what estate remains undisposed of where there has been a prior absolute devise of the entire estate.

The language of the will cannot be construed as indicative of an intention to give to testator's widow only a life estate. It will be noted that the attempted limitation over was not of the entire estate devised to his wife, but only of that part remaining at her death.

It may be said that to construe the will as giving to the widow a fee in the devised property, will defeat the intention of testator. While we do not believe a different conclusion from that reached is justified by the wording of the will, yet this would be true in all cases where a testator undertakes to do that which the law does not permit.

That a remainder cannot be limited after a devise in fee, is well settled in this and many other states. *Barth v. Barth*, etc., 18 R. 840, 38 S. W. 511; *Dulaney*,

etc. v. Dulaney, etc., 25 R. 1659, 79 S. W. 195; Nelson, et al. v. Nelson's Exor., 140 Ky. 410, 121 S. W. 187; Plaggenborg, et al. v. Molendyk's Admr., 187 Ky. 509, 219 S. W. 438; Fernandez, et al. v. Martin, 189 Ky. 438, 225 S. W. 27, and note to Moran, et. al. v. Moran's Exor., 106 Mich. 322, 106 N. W. 206, found in 5 L. R. A. (N. S.) 323.

Entertaining the view that Emma H. Llewellyn took a fee simple estate under the terms of her husband's will, the judgment on the cross appeal is affirmed and on the original appeal reversed for further proceedings not inconsistent herewith.

E. P. Barnes & Brother v. Eastin, Admr.

(Decided November 9, 1920.)

Appeal from Ohio Circuit Court.

1. **Highways—Driver of Motor Car Must Maintain Lookout.**—A driver of a motor car upon a public highway must keep a lookout ahead for other vehicles and persons upon the road; sound warning signals at all points where he can not see the road for a distance of 300 feet in advance; keep to the right of the road in the direction he is driving and keep his vehicle under control.
2. **Highways—When Driver of Motor of Motor Car Guilty of Gross Negligence.**—A driver of a motor car who in an effort to pass a car in front of him traveling in the same direction, turns his vehicle to the left of the road and into a portion of the road usually traveled by persons driving vehicles in the opposite direction and continues to speed ahead though engulfed in a cloud of dust so dense he can not see the road or other vehicles approaching, is guilty of gross negligence.
3. **Highways—Duty of Driver of Motor Car.**—A driver of a motor car who runs into a cloud of dust so thick he can not see the road should bring his car to a standstill and sound a warning notifying persons of his presence.
4. **Highways—Passenger as Guest of Driver of Motor Car.**—A passenger riding as the guest of the driver of an automobile is not guilty of contributory negligence precluding her recovery if the accident which brings about her injury results from the concurring negligence of the driver of the automobile in which she is riding and that of the driver of a truck traveling in the opposite direction.
5. **Highways—Responsibility of Owner of Truck.**—A truck which is owned and used by a mercantile firm for and in the delivery of goods, and driven by the firm's employee under the direction and

control of the general manager of the firm, the driver acting for and under the direction of the general manager and working upon the time of the firm, is in the service of the firm and the firm is responsible for his wrongful acts committed in the performance of his duties.

BARNES & SMITH and J. S. GLENN for appellants.

HEAVRIN & MARTIN for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

May Eastin, fifteen years old, lost her life in an automobile collision while she was riding as a guest of the driver, and her father, as administrator, brought this suit to recover damages for her death. This appeal is prosecuted by Barnes Bros., of Beaver Dam, to reverse a judgment for \$4,000.00 entered upon a verdict for that amount in favor of the administrator.

She was a visitor in the vicinity of Beaver Dam in August, 1918, and met Dorris Martin and wife who invited her to take a ride with them in an automobile which Martin was driving. She accepted and the three, seated on the front seat of the car, started in the direction of Hartford, only a few miles away. The weather was hot and dry, and it was late in the afternoon. From the evidence it appears that Martin was driving rather fast and when he came near the place of the accident some of the witnesses say he was going thirty to forty miles per hour. The road runs over a small rise or hill and just as the car in which May Eastin was riding was approaching the summit of this rise, a car driven by a young man named Wilson came suddenly down the hill, passing the Martin car and casting up a great cloud of dust, so that the occupants of the Martin car could not see the road or even one another, whereupon Martin immediately put on both the service and emergency brakes in an effort to stop the car. While this was being done the car ran over the crest of the hill and was on the downward slope some 150 or 200 feet from the point at which the Wilson car passed Martin. The Martin car was on the right hand side of the road. Just after the car had passed the top of the hill and was starting down the slope on the other side, a truck owned by appellants, Barnes Bros., and driven by their chauffeur, Oldham, ran into and against the front end of the Martin car with such force that the impact threw Martin, wife and Miss Eastin forward against the glass windshield, cutting the juglar vein and windpipe

of Miss Eastin, from which injury she immediately thereafter died.

The public road along which they were traveling was about 26 feet wide; about 9 feet of the right hand side of the road as one travels from Beaver Dam to Hartford is macadamized while the balance of the road, about 17 feet, is dirt. Martin in the operation of the automobile was obeying the law of the road by keeping to the right, and at the time of the collision his car was on the macadam road, where it had a right to be. It appears that the Barnes truck was attempting to pass the Wilson car just in front of it, and in order to do so, turned towards the left side of the road on to the macadam in violation of the rules of the road. The dust was so dense that the driver, Oldham, could not see the road or approaching car. All the witnesses testify that the dust obscured everything and neither of the drivers was aware of the approach of the other car. No warning signals were given by either car.

The petition makes the following averments of negligence: "On the 16th day of August, 1918, while the said decedent, May Eastin, was traveling on the Hartford and Beaver Dam public highway, in Ohio county, Kentucky, in an automobile, and while exercising ordinary care for her own safety, the said E. P. Barnes & Bro., by its agent and servant in charge and control of one of its said automobile trucks or cars, carelessly and negligently drove said automobile truck or car into and against the car in which the said decedent was riding and said decedent was thereby by impact of said collision thrown against the wind shield of said car in which she was riding thereby severing her windpipe and juglar vein, which resulted in her death in a few minutes; that said agent and chauffeur in charge of said defendant's car or truck and operating said car or truck was incompetent, unqualified and unlicensed, which facts were all known to the defendants; that said chauffeur or agent of said defendants was operating said car in violation of law on the public highway. . . . The collision heretofore referred to occurred at a curve and on a hill on said public highway and that the said chauffeur operating said defendant's car or truck could not observe the road 300 feet in front of him and that at the time said defendant, by its agent or servant in charge of and operating said car or truck, was driving same in a grossly negligent and careless manner and at an excessive high rate of speed and

without giving any warning or signal of any kind of the approach of said car or truck and came suddenly and unexpectedly upon said car in which said decedent, May Eastin, was riding without any notice or warning whatever to said decedent or the driver of the car in which the decedent was riding and ran into and collided with said car without giving the occupants or the driver of same any chance or opportunity to avoid a collision with said car or truck."

The negligence relied on in brief of counsel for appellees is stated as follows:

First: Negligence of appellants' chauffeur in driving the car at the time and place complained of at an unreasonable and unnecessary rate of speed.

Second: Negligence of appellants' chauffeur in running the car on the left hand side of the highway, in the direction in which he was going, up a hill, on a curve, in a cloud of dust, when he could not see objects in front of him without giving any warning of his approach.

Third: Negligence of the chauffeur of appellants' car in failing to give any signal of his approach to the summit of the hill.

Fourth: Negligence of the chauffeur of appellants' car in failing to turn to the right of the center of the road in attempting to pass the car driven by Dorris Martin, in which appellee's decedent was riding.

The answer traverses the allegations of negligence contained in the petition and affirmatively pleads contributory negligence.

In their brief counsel for appellants assert the following fourteen reasons why the judgment should be reversed:

1. It was an unavoidable accident on the part of Oldham, the driver of appellants' car, and of negligence of Martin, the driver of car in which decedent was riding.

2. Oldham, appellants' driver, was not negligent at the time.

3. It was error to reject the testimony of Oldham as to speed of the Martin car at the time of accident, based on the shock of the impact.

4. It was error to refuse to admit statement by Martin made immediately after accident, that the speed of his car was the cause of the accident.

5. It was competent to prove that decedent's mother and her sister reproved Martin in decedent's presence

for reckless driving, as these facts brought to her notice of his character as a reckless driver.

6. It was competent to show, by witnesses, the general reputation of Martin as a reckless and careless driver.

7. Under any theory of the case it was competent to show that Oldham was not acting for appellant company in making the trip but was acting for Byron Barnes alone.

8. The court should have sustained appellants' motion for a directed verdict.

9. Under the law appellee's decedent was required to exercise ordinary care for her own safety under the circumstances surrounding her and was guilty of contributory negligence preventing a recovery.

10. Instructions numbers 1, 2 and 3 are erroneous statements of the law as applied to the facts and were misleading to the jury.

11. Oldham had the right to run his car on any side of the road except when passing another car.

12. The petition set out the specific acts of negligence complained of, five in number, as follows:

a. Oldham was incompetent and unqualified.

b. He was operating the car unlawfully, as he had no license.

c. He was operating at more than twenty miles an hour.

d. He failed to sound an alarm at a point where he could not see 300 feet in front, and that the accident occurred at a curve on a hill.

e. That he was operating it at an excessive speed.

13. There being no evidence that Oldham was incompetent or that he was exceeding twenty miles an hour or going at an excessive speed, it was error to instruct on these points.

14. The instructions submitted false issues not made in the pleadings or proof and thus the jury were led into the field of speculation as to the facts.

Almost any one of the fourteen foregoing reasons would be sufficient to reverse the judgment if it existed in this case. They may be reduced to a much less number, because numbers 1, 2, 7 and 8 may be considered under one head, and 3, 4, 5 and 6 under another, and all the others under the subjects of "contributory negligence" and "instructions to the jury."

Was the collision an unavoidable accident, An unavoidable accident is one from which there is no escape.

But an accident which could have been prevented or avoided by the exercise of ordinary prudence, is not an unavoidable accident. The injury and death of Miss Eastin could, as appears from all the evidence, have been avoided if the driver of the truck had exercised ordinary care to prevent injury to others on the public highway. If Oldham had exercised ordinary care to keep the truck in its proper place in the road, or had sounded a warning signal, or had stopped the truck when he came into the cloud of dust no injury would have occurred.

A driver of a motor truck on a public highway who voluntarily turns his vehicle from the right hand side of the road to the left where vehicles going in the opposite direction are expected to travel, at a time when he can not see the road for dust, without giving a reasonable warning signal, is grossly negligent.

Oldham as well as Mr. and Mrs. Martin testify that the dust was so dense one could not see the road or any object immediately before him at the time of the accident. They are the only living witnesses. However, counsel for appellants insist that the witness Oldham should have been allowed to answer how fast the Martin car was traveling at the time of the accident based upon the impact. This would have been an impractical and vague thing to attempt, for we apprehend such a mathematical problem would be well nigh if not entirely beyond the grasp of the human mind. Moreover there was no qualification of the witness, for he did not show any special learning or knowledge of the subject. So far as the record discloses this was the only collision of motor cars which Oldham ever witnessed. He was not therefore qualified to give an opinion as an expert on how fast the Martin car was traveling at the time it encountered the truck driven by Oldham.

So far as the record shows Martin was guilty of no negligence at the instant of the accident, whatever may have been his want of care at other times. It was therefore unimportant as to what he said shortly after it happened about what caused the accident, and his statement, however strong it may have been, exonerating Oldham or self accusatory, would not have prejudiced the rights of the administrator of the decedent because the negligence of the driver was not imputable to her. She had no control over the driver or car and therefore his negligence was not a bar to her estate's recovery for the wrong in-

flicted upon her through the concurring negligence of the drivers of the two cars.

The case of *Hackworth v. Ashby*, 165 Ky. 799, was very similar to the instant case. The defendants' car was on the wrong side of the road when it ran into the car in which the plaintiff was a passenger guest, and we said:

"The issue in this case was whether the defendants, through the driver of their car, were negligent, and whether such negligence, if any, caused or contributed to the plaintiff's injuries. These things being found to be true, negligence on the part of Carrithers in driving the car in which plaintiff was riding, would not excuse the negligence of defendants, for even if Carrithers was negligent, and his negligence concurred with negligence upon the part of the defendants in causing plaintiff's injuries, she may recover from the defendants therefor. *Paducah Traction Company v. Sine*, 111 S. W. 356, 33 R. 792. Nor is the degree to which defendants' negligence contributed in causing the injury necessary to be determined. *North Jellico Coal Company v. Trosper*, 165 Ky. 417, 29 Cyc. 487."

The administrator was entitled to recover of *Barnes Bros.* although they were not guilty of all the negligence which brought about her injury and death, if guilty of concurring negligence which contributed to her injury and death; and even though *Martin* was guilty of negligence at the time of the collision other than fast or reckless driving her cause of action against *Barnes Bros.* would not be taken away even if it be admitted she was aware of the proneness of *Martin* to speed his car, or knew that he was a reckless driver, for this knowledge could have taken away no cause of action in her favor which did not directly arise out of fast or reckless driving, and this was not true of this injury. The rule recognized and approved in the *Winston* case (179 Ky. 220) has no application to the facts of this case, for *Miss Eastin* did not in any degree contribute to her own injury.

While a passenger riding in a motor car can not shut his eyes to surrounding perils and rely on the driver for safe conduct, it has never been held that a passenger's cause of action for the negligence of a third party which caused a collision and injury to the passenger, is defeated by a showing that the driver of the passenger car was careless or unskillful, unless his carelessness or unskillfulness contributed directly to the injury. This was not shown in this case, but on the contrary the driver of the

truck was guilty of gross negligence which brought about the injury and death of the little girl.

Unless the carelessness and recklessness of Martin contributed to the injury of Miss Eastin it was not important that he had a reputation for reckless or careless driving.

Of course Barnes Bros. would not be liable for the negligence of Oldham, the driver of the truck, if he were not then in their service performing a duty in the regular line of his employment. He was the chauffeur and delivery boy for the firm, and regularly had charge of their truck. He was under the direction of the general manager of the store and took orders from him. The general manager in the exercise of his authority over him told the chauffeur to go to Hartford and bring some ice, and while on this trip the accident happened. The chauffeur was working on the firm's time and not his own or that of the general manager's as an individual. The truck was in charge of its chauffeur and under the direction of the general manager of the firm. This case does not fall within the class where the chauffeur steals the car out for an object of his own or while out for his master abandons the master's service to perform one wholly his own. In such cases the master is not liable. *Eakin's Admr. v. Anderson*, 169 Ky. 1; *Crady v. Greer*, 183 Ky. 675; *Miller v. National Automobile Sales Co.* (1913), 177 Ill. App.; *Curren v. Lorch* (1914), 243 Pa. 247.

The general manager of the firm directed the chauffeur to take the car of the firm and perform a special duty which he was attempting at the time of the accident. The truck was therefore in its regular line of employment as was the chauffeur Oldham, and his acts were the acts of the firm, and it was liable.

Decedent was guilty of no negligence, so far as the record shows, which contributed to bring about her injury.

A peremptory instruction in favor of appellants would have been error.

The instructions given by the trial court to the jury very carefully define the duties of the driver of the truck, and told the jury to find for the administrator, if it believed from the evidence that the truck driver was guilty of a violation of any of said duties.

The court correctly instructed the jury that it was the duty of the driver to have the truck under reasonable control, to give notice of its presence by the customary sig-

nals; to keep a lookout for vehicles upon the highway; to exercise ordinary care to prevent injury to persons or vehicles upon the highway; to operate the truck in a reasonably careful manner and at a reasonable rate of speed so as to be able to turn the truck on the right side of the center of the road in the direction in which said automobile was moving in passing the car in which decedent was riding, and to reduce the speed of the truck to not exceeding 15 miles per hour while passing an automobile. Practically all these things were required of the driver of a vehicle upon the highway by the common law before the enactment of our statutes upon the subject of motor vehicles. They reasonably facilitate traffic and render our highways fairly safe for public travel which would not be true but for such rules and regulations. The jury was further told that it was the duty of the driver of the truck to give warning of its approach to the summit of the hill by signaling with a bell, horn or other device, and to give such signal at any point on the highway where he could not see the road on which he was driving in front of him for a distance of 300 feet. Part of this instruction follows the statutes, and the balance is the common law of the land. As the driver of the truck could not see a car approaching from the opposite direction until it reached the top of the hill within less than 300 feet of where the collision occurred, it was the duty of Oldham to have sounded a warning signal, but this duty was magnified and emphasized when in attempting to pass the Wilson car in front of him he ran into a cloud of dust so thick that he could not see the road or any object. In such condition it was the imperative duty of the truck driver to sound a warning signal and to have his car under complete control, because that was a highway where the public had a right to be and travel in vehicles or on foot. Under such circumstances, all well known to the driver, he should have sounded a signal indicating his presence and at the same time brought his truck to a stop until the dust so cleared as to enable him to see the road and to know of the approach of other vehicles. Especially was this true while the truck was on the left hand side of the traveled road. It is plain from the evidence that Miss Eastin would not have received her injury but for the negligence of the driver of the truck in attempting to proceed without giving a warning in a cloud of dust which cut off his vision.

There was no contributory negligence on the part of Miss Eastin while she was riding as a guest of the Mar-

tins, and the negligence, if any there was, of Martin was not imputable to her. It is claimed however that she was guilty of contributory negligence in accepting the invitation from Martin whom it is charged she knew to be a fast and reckless driver. Reliance is had upon the Winston case, reported in 179 Ky. 222, and other cases holding to the rule that where a passenger trusts himself to the care of a drunken or unskillful driver with knowledge of the facts and the drunkenness or unskillfulness of the driver results in injury to the passenger, the passenger is guilty of contributory negligence. If there was any evidence to show that Martin was an unskilled and reckless driver, and that his unskillfulness and recklessness in driving contributed to or brought about the injury of Miss Eastin, it would have been proper to have submitted the question to the jury, but in the absence of such evidence it would have been error for the trial court to have submitted such an issue. If it be admitted that Martin was a rapid and reckless driver, still the evidence shows that he was driving at a place in the highway where he had a right to be, and that the truck of appellants' was being driven at a place where it had no right to be and but for the want of care of the driver of the truck in turning out on to the left side of the highway, no accident would have happened. It, therefore, follows that as the negligence with which they charge Martin did not and could not have contributed in the slightest degree to the accident which injured Miss Eastin, she could not be charged with contributory negligence in accepting his invitation to take a drive. This rule, however, does not abrogate in the slightest the principle announced in the Winston case, where we held "that the negligence of Nunnelly, the driver, is not imputable to Winston, nevertheless Winston, the injured party, was guilty of negligence in intrusting himself to such driver, he at the time being in possession of all the facts and knowing of the intoxicated condition of Nunnelly. This of itself was negligence which so contributed to the injury and death of Winston that but for which Winston would not have been injured."

There can be no doubt of the correctness of the rule which requires drivers of motor vehicles, while on the public highway, to exercise ordinary care to prevent injury to others, and this care can be exercised only by having the driver's vehicle under control, by giving reasonable warning of its approach to other vehicles and to persons and by exercising caution commensurate with

the immediate situation when the driver suddenly becomes engulfed in a cloud of dust or other blinding conditions, or where from sharp turns in the road, overhanging foliage, or other obstructions he can not see the road or tell the approach of other vehicles or persons from the opposite direction. Under such conditions a much greater duty rests upon the driver of a motor vehicle than under ordinary conditions where his vision is not obstructed. Where there is a duty to exercise a higher degree of care, there is a correspondingly high responsibility in case of injury through a failure to exercise a degree of care commensurate with the situation.

Finding no error to the prejudice of appellants, the judgment is affirmed.

Judgment affirmed.

Commonwealth v. Stites.

(Decided February 8, 1921.)

Appeal from Ohio Circuit Court.

1. **Criminal Law—Defendant Charged With Different Offenses—Election.**—A defendant who is chargeable with several different acts any one of which, if proven, would sustain a conviction of the crime charged in the indictment, can be tried for only one of the acts at a time, though proof of other acts in corroboration of the act relied upon for a conviction may be heard, and the Commonwealth's attorney should be required to elect which act he will rely upon for a conviction, and if he fails so to do the law makes the election for the Commonwealth of the act of which substantive evidence is first introduced.
2. **Criminal Law—Accomplices.**—A child 13 years old who is under the domination of her father and who permits or acquiesces in the commission of a crime out of fear of her father and against her will, is not an accomplice of her father in the commission of the crime though she participated in it.
3. **Criminal Law—Confession.**—A confession of the defendant made out of court is insufficient in the absence of other proof of the commission of the crime to sustain a conviction.
4. **Criminal Law—Reasonable Doubt—Instructions.**—In giving an instruction on reasonable doubt in criminal cases the trial court should follow closely the language of section 238, Criminal Code, and should not enlarge thereon by saying the law presumes the innocence of the defendant and that it is the duty of the jury, if it can reasonably do so, to reconcile all of the facts and circum-

stances of the case with that presumption, for this comes more properly in the argument of counsel.

CHARLES I. DAWSON, Attorney General, and C. E. SMITH for appellant.

M. L. HEAVRIN for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Certifying the law.

In order to obtain a certification of the law of this case the Attorney General of the State and Commonwealth attorney of the 6th Judicial District have prosecuted this appeal from a judgment of acquittal entered on a verdict in the Ohio circuit court. Stites, who was indicted on the evidence of his daughter for the crime of incest, being put upon trial was acquitted, although the evidence against him seems to have been overwhelming.

The attorneys for the Commonwealth complain of several alleged errors of the trial court, among them being, (1) Unwarranted and incorrect instructions, (2) Admission of incompetent evidence for the defendant, and rejection of competent evidence offered in behalf of the Commonwealth.

The prosecuting witness, Pearl Stites, was but 13 years of age at the time she testified. She testified that her father, the appellee, began to have carnal knowledge of her some two or three years before the trial, and that on divers days, and especially on a certain occasion near a tobacco patch, he compelled her to submit to his sexual desires and that her sister Mable, older and now married, was present and witnessed the revolting sight. She was sustained fully by the evidence of the sister, who says she saw her father compel the child to submit to him at least five different times on different days at the tobacco patch, but that she was not at the patch every day that the father and Pearl worked there and could not tell about other occasions of which the little daughter testified. Other witnesses gave evidence tending to establish the guilt of appellee, one saying that Stites had, while denying a recent charge of intercourse with his daughter, admitted that he had on former occasions yielded to his baser passions and had committed the crime; another saying that an examination of the vagina of the little girl shortly after the alleged intercourse disclosed that the organ

was open and developed as that of a woman who regularly cohabited with a man. The facts are as loathsome and revolting as ever read by a court.

The trial court followed the usual instructions to the jury on the crime of incest, with one which reads as follows:

“In considering the question of the guilt of the defendant of the alleged acts of sexual intercourse with the witness, Pearl Stites, you will only consider the first time in July, mentioned by said witness as having occurred at the time when her sister, Mable Fulkerson, was not present, and you will only consider the proof of the other acts of sexual intercourse, testified to by her or by the witness, Mable Fulkerson, for the purpose of corroborating the evidence introduced to prove the guilt of defendant of the first act to which Pearl Stites testified as having occurred in July, when her sister was not present, if it does so corroborate her evidence, and for no other purpose.”

This instruction the Commonwealth insists was erroneous, for as the court had required it to elect which of the alleged incestuous acts it would rely upon for a conviction and it had elected to rely upon an act committed at the tobacco patch in July, 1919, and had introduced the prosecuting witness by whom it was proven that her father compelled her to submit to him and to allow him to have carnal knowledge of her in July of that year, at the tobacco patch, when her sister Mable was present and witnessed the occurrence, it was improper for the court by this instruction to elect to try appellee for another and different act when the sister Mable was not present.

The generally accepted rule is that where the defendant is chargeable with the commission of several different acts any one of which, if proven, would sustain a conviction under the indictment, the attorney for the Commonwealth should elect, before introducing witnesses, upon which act he will rely for a conviction, and where he does so he is bound during that trial by the election, even though he may be permitted to prove other sexual acts of the defendant, in corroboration of the evidence of the crime charged, but if the attorney for the Commonwealth fail to make such election, and proceeds to the introduction of evidence, the law will make an election for him of the act of which he first in-

troduced evidence, and he will be bound to look to that act as the principal act upon which to have a conviction. When the attorney calls a witness and introduces evidence of an act which might be the basis of the charge in the indictment he makes the act so first proven in evidence, the election of the Commonwealth. *Newsom v. Commonwealth*, 145, Ky. 627; *Gravitt v. Commonwealth*, 184 Ky. 429. In the case of *McCreary v. Commonwealth*, 163 Ky. 209, we stated the rule in this language:

"The court also admonished the jury that it could consider the proof of other acts of sexual intercourse given in the evidence, and subsequent to the first one, only for the purpose of corroborating the evidence conducing to show the appellant guilty of the first act, if it did tend to corroborate and for no other purpose. In this the trial court seemed to have been correct, as upon a trial upon a charge of this kind, and under an indictment such as in this case, and where different acts of sexual intercourse between the defendant and the complaining witness are in evidence, and the attorney for the Commonwealth fails to formally make an election, as to which one of the acts he will rely upon for a conviction, the law will make an election for him, and will elect the act about which substantive proof is first introduced for the purpose of conviction."

Following this rule the court should not have given the instruction above copied, for it directed the jury to only consider and convict, if at all, for an act done when the sister Mable was not present, whereas the evidence shows that at the time of the first act testified about, Mable was present. But this error will not occur upon another trial, if there be one, for another and different incestuous act.

The second objection is to an instruction telling the jury that if it believed that Pearl Stites was an accomplice of her father in the commission of the crime charged, no conviction could be had upon her evidence unless corroborated by other evidence tending to connect the defendant with the commission of the crime. One who does not consent to nor willingly participate in the commission of a crime cannot be an accomplice.

Pearl Stites testified that her father forced her to let him have intercourse with her; that it was against her will. The sister states the same and no one pretends to say that Pearl willingly consented to or acquiesced in

the crime. The evidence all being one way, that she was not an accomplice, there was nothing to submit to the jury on that subject, nor grounds for the giving of the instruction of which complaint is made. *Whittaker v. Commonwealth*, 95 Ky. 632; *McCreary v. Commonwealth*, 163 Ky. 206.

The Commonwealth next complains that the third instruction reading:

"A confession of the defendant, if there was such, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed," should not have been given. Section 240 of the Criminal Code reads:

"A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed.

We have several times held that where a confession was made out of court, is accompanied by other proof independently of the confession that the crime has been committed, it is not proper to instruct the jury as provided in this section. *Dugan v. Commonwealth*, 102 Ky. 244; *Clary v. Commonwealth*, 163 Ky. 55; *Bates v. Commonwealth*, 164 Ky. 1; *Green v. Commonwealth*, 83 S. W. 638; 14 R. C. L. 38, but where it is doubtful if the crime has been committed the jury should be instructed as in the section above quoted.

Here there was abundant evidence, aside from the alleged confession, that the crime had been committed and the alleged confession was competent as evidence to be considered along with other facts and circumstances proven in the case and no instruction should have been given on the subject. In fact it is very doubtful whether such an instruction should ever be given, for if there is no evidence of the commission of the crime except the confession of the defendant made out of court, the jury should be peremptorily directed to find him not guilty, without submitting any question to it. At any rate it should never be given where there is direct and positive evidence that the crime was committed by the defendant on trial.

We have repeatedly written that the reasonable doubt instruction in criminal cases should closely follow the words of the Criminal Code, section 238. Instruction No. 4 reads:

"The law presumes the innocence of the accused, and it is the duty of the jury, if they can reasonably do

so to reconcile all the facts and circumstances of the case with that presumption; and if, upon the whole case, you entertain a reasonable doubt of the guilt of the accused, or of any material facts necessary to constitute his guilt of the offense charged in the indictment, as stated in instruction No. 1, having been proven, then you should find the defendant not guilty."

While the instruction complained of has often been given, and has been before this court where the defendant was appealing and we have held it not prejudicial to him, because too favorable to him, we do not think it should ever be given, for it amounts to a brief argument in favor of the defendant. *Mickey v. Commonwealth*, 9 Bush 593; *Ward v. Commonwealth*, 14 Bush 233; *Breedon v. Commonwealth*; 151 Ky. 217; *Minniard v. Commonwealth*, 158 Ky. 210; *Clary v. Commonwealth*, 163 Ky. 48; *Mearns v. Commonwealth*, 164 Ky. 213.

If we follow this rule, as we must, the jury will be instructed:

"If you entertain a reasonable doubt from the evidence, of the guilt of the accused, he is entitled to an acquittal."

This should not be enlarged or elaborated, for the code provision does not warrant it.

When a witness is called to prove the good moral character of the defendant, he should be examined with special reference to the particular attribute or trait of character involved, as for instance, if the defendant is charged with incest, evidence of his good moral character is competent in his behalf, but it should specially relate to his orderly conduct with respect to the opposite sex, sexual lust and desire, and not so much to his industry and honesty. Of course the attorney for the Commonwealth is privileged to cross-examine such witness with special reference to the trait of character involved. 22 C. J. pages 473 and 474. *Underhill on Criminal Evidence*, section 77.

The Commonwealth offered to prove on the trial by two older married sisters of the prosecuting witness, that she was a normal person; that they had nursed and cared for her from her infancy up to a short time before the date at which she says her father began his assaults upon her and that her private organs were normal; that shortly after the happening of the act of which the Commonwealth complains, they, the two older sisters, made an ocular and digital examination of her vagina and

found it enlarged and extended and the hymen destroyed in the same manner as that of a matured married woman who had been regularly cohabiting with her husband. These witnesses qualified by showing that they were acquainted from experience and information with the result to the vagina of a maiden by copulation with a man, and that the organ of Pearl was in the same state as that of a woman who regularly cohabited with a man.

This evidence was rejected by the court, but we think erroneously. After qualifying by showing their opportunities to know and their knowledge of the conditions which result from sexual intercourse, the court should have allowed the witnesses to testify.

We cannot fail to appreciate the great care which the learned circuit judge exercised for the protection of the rights of the accused in the trial of the case, and the extreme difficulty in a long and nauseating trial like this for the court to wholly avoid errors. It may be said that none of the errors appearing in the record were of a serious or unusual nature, nor such as often creep into the record amid the hurry and strain of the trial.

All of which is certified as the law of the case.

Grainger, et al. v. Edwards.

(Decided February 8, 1921.)

Appeal from Warren Circuit Court.

Deeds—Construction—Intention of Grantor.—Where the granting clause of a deed and the habendum are in irreconcilable conflict and there is nothing in the instrument from which the real intention of the grantor may be gathered, the granting clause will prevail.

HERMAN & ROPER for appellants.

SIMS, RODES & SIMS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

A colored man named Edwards made a deed to his wife, Alice, in 1905 for a house and lot in Bowling Green, Ky., the granting clause of which reads as follows:

“That for and in consideration of the love and affection which the party of the first part has for his wife,

the party of the second part, the said party of the first part has sold and hereby aliens, transfers and conveys unto the said party of the second part, during her life."

A description of the property follows, at the conclusion of which is the habendum clause, reading:

"To have and to hold the same with all the appurtenances thereunto belonging unto said party of the second part, her heirs and assigns forever with covenant of general warranty. In testimony whereof, the party of the first part has hereunto signed his name the day and date above written."

This deed was duly signed and acknowledged by Edwards, and lodged for record and recorded in the proper office in October, 1905. Edwards died intestate and childless, in February, 1919, leaving his wife, the grantee, surviving him. Soon after his death she commenced this action in the Warren circuit court against his brothers and sisters to have herself adjudged the owner of the fee-simple title, and not merely a life estate in and to the house and lot mentioned in the deed, and the defendants adjudged to have no interest whatever therein. With the petition she filed a copy of the deed and prayed a construction of it. The lower court adjudged her the owner in fee, and the heirs of Edwards appeal.

The question is, did Alice Edwards as grantee in the deed from which we copy above, take a fee or merely a life estate? The granting clause of the deed says to her "during her life" and there is nothing whatever in the deed which contradicts or explains this clause except the habendum, which says "to her and her heirs and assigns forever with covenant of general warranty."

The cardinal rule in the construction of deeds requires us to look to the whole instrument to find the intention of the parties thereto, and if the purpose can be ascertained from the instrument, it being paramount shall prevail, but where there is nothing in the instrument which indicates the intention or purpose of the parties or the estate to be conveyed, except the granting clause and the habendum, and they are in irreconcilable conflict, the granting clause will prevail over the habendum. In 18 C. J. page 33, it is said:

"All the language of a grant should be considered and effect given to it unless so repugnant and meaningless that it cannot be done, in which case the repugnant or meaningless portion may be rejected. So the habendum cannot stand with the premises where so repugnant

thereto as to be irreconcilable. The habendum may, however, be construed as explaining, qualifying, or limiting that which is stated in general terms in the premises. A remainder may be created in a grantee who is first mentioned in the habendum clause." *Ratliffe v. Ratliffe*, 182 Ky. 230; *Ballard v. L. & N. R. R. Co. &c.*, 5 S. W. 484; *Ratliffe v. Marrs*, 87 Ky. 26; *Hall v. Wright*, 121 Ky. 16; *Virginia Iron, Coal & Coke Co. v. Dye et al.*, 146 Ky. 519; *Bodine v. Arthur*, 91 Ky. 53; 34 A. S. R. 162; *Jordan v. Neece*, 31 A. S. R. 869; 17 R. C. L. 619.

In the case of *Henderson v. Mack*, 82 Ky. 381, we stated the rule in the following way:

"The office of the habendum clause in a deed is to limit and define the estate granted, and while, as a general rule, it must give way to the granting words of the deed, when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument to arrive at the intention of the maker, which must govern, when ascertainable. When the intention does not appear, then the words of the grant should govern, if repugnant to the habendum of the deed; but if the intention is apparent, then it should govern. This rule, we believe, is consistent with reason and upheld by authority."

A well considered case dealing with rules of construction applicable to deeds is *Porter v. Wells*, 187 Ky. 417, to the same effect.

Applying this well recognized rule to the deed under consideration we must hold that it conveyed a life estate only and not a fee. One may, as did Edwards in this case, convey a life estate in land of which he is the owner, and retain to himself the remainder in fee.

The words "during her life" as here employed must be held to mean just what they say, and vest the grantee with an estate during her life only. As the habendum clause is in the regular form generally found in printed deed blanks, the conflict between it and the granting clause may be attributed to the fact that the draftsman of the deed used such a printed blank form in the preparation of the instrument. Be that as it may we must resort to the established rules of construction of deeds, in the absence of other statements or clauses enabling the court to satisfactorily reach another conclusion by following the reasonable and just rule of construing such instruments according to the intention and purpose of

the parties as manifested by a reading of all its parts together.

Judgment reversed for proceedings consistent with this opinion.

Henderson Cotton Mills v. Trigg, Sheriff of Henderson County.

(Decided February 8, 1921.)

Appeal from Henderson Circuit Court.

1. **Drains—Special Benefits.**—Special benefits arising from the construction of a ditch for which a landowner may be assessed, as distinguished from general benefits for which he may not be assessed, are those which increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.
2. **Judgment—Drains—Conclusiveness—Matters Concluded.**—Where in the original proceeding it was finally adjudged that the establishment of a ditch was a benefit to plaintiff's land, the judgment is res judicata as to that question in a subsequent attack on an assessment to maintain the ditch, unless it be made to appear that since its establishment the ditch has been so changed or altered by official action taken pursuant to legislative authority that the original benefits no longer exist.

JOHN C. WORSHAM for appellant.

JOHN L. DORSEY, JR., for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

This is the second appeal of this case. The opinion on the former appeal may be found in 177 Ky. 613, 197 S. W. 1074, under the title of Trigg, Sheriff, et. al. v. Henderson Cotton Mills, et. al.

The suit was brought against the sheriff of Henderson county and the board of drainage commissioners to enjoin the collection of certain taxes levied for the maintenance of "Sellars Ditch." It appears from the original petition that the ditch was constructed under the drainage act of March 23, 1900, and the property of the Henderson Cotton Mills was assessed in the sum of \$116.74, while a further assessment of \$3,502.20 was made on the city of Henderson because of the benefits to the city and its citizens. At that time the property

of plaintiff lay outside of, but adjoining, the corporate limits of the city. In the year 1905, the limits of the city were extended so as to include the property of plaintiff. In the year 1915, the board of drainage commissioners assessed plaintiff in the sum of \$11.67, and the city of Henderson in the sum of \$350.22, for the maintenance of the ditch for the year 1915. The city levied a tax on all property therein for the purpose of paying its assessment. Plaintiff paid its part of this tax and pleaded its payment as a bar to the collection of the special assessment made against its property for the maintenance of the ditch. Judgment was rendered enjoining the defendants from collecting the special assessment. On appeal the judgment was reversed, the court holding that the liability of the property to pay the two taxes grew out of separate and distinct obligations, the one to pay the special benefits, the other to pay its part of the general benefits resulting to the city as a whole, and that the imposition of the two taxes did not constitute double taxation.

On the return of the case plaintiff filed an amended petition pleading in substance that, prior to the annexation to the city of the territory including plaintiff's property, plaintiff had a private sewer leading from its property and emptying into Canoe Creek; that the entire drainage of plaintiff's lands, which were assessed for the original construction of "Sellars Ditch," was through such private sewer; that following the annexation of plaintiff's property the city took over, and has since maintained, the sewer as a part of the sewerage system of the city; and that since that time plaintiff's property has had no drainage into Canoe Creek independent of, or separate from, the sewers of the city, and has received no special benefit from Canoe Creek or the "Sellars Ditch." A demurrer was sustained to the petition as amended and the petition dismissed. Plaintiff appeals.

It is insisted that the demurrer to the amended petition should have been overruled for the following reasons: Special assessments can only be sustained on the ground that the property assessed receives special benefits in addition to those received by the community at large, and inasmuch as all the citizens of the city of Henderson are sharing the use of the sewer leading from the property in question, the property is receiving

no benefit that is not enjoyed by others. It must not be overlooked that special benefits arising from the construction of a ditch for which a landowner may be assessed, as distinguished from general benefits for which he may not be assessed, are those which increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. *Pipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Dodge County v. Acom*, 61 Neb. 376. 85 N. W. 292; 9 R. C. L., p. 664. In the original proceeding it was finally adjudged that the establishment of the ditch was a benefit to plaintiff's land, and the judgment therein rendered is *res judicata* as to that question in a subsequent attack on an assessment to maintain the ditch, *Book, et al. v. Trigg, et al.* 186 Ky. 664, 217 S. W. 1013; *Williams v. Wedding*, 165 Ky. 361, 176 S. W. 1176, unless it be made to appear that since its establishment the ditch has been so changed or altered by official action taken pursuant to legislative authority that the original benefits no longer exist. Here no such change or alteration in the ditch is relied on. On the contrary the ditch is the same as when first established, and still affords an outlet for the drainage from plaintiff's land. That being true, the special benefits still continue, notwithstanding the fact that plaintiff has permitted others to share the sewer leading from his land to the ditch. It follows that the demurrer to the amended petition was properly sustained.

Judgment affirmed.

Halcomb v. Taylor.

(Decided February 8, 1921.)

Appeal from Simpson Circuit Court.

Contracts—Consideration.—Where the purchaser of a tract of land promised to give a tenant in possession \$500.00 for the surrender of the possession on January 1st of the following year, the tenant's contract with his landlord to be cancelled when the possession was given, there was no failure of consideration because the lease was within the statute of frauds or the landlord did not consent in writing to the assignment thereof, since the \$500.00 was to be paid not for an assignment of the lease,

nor for the purpose of acquiring any rights thereunder, but solely for the purpose of obtaining possession and putting an end to the tenant's rights under the lease.

EVANS & MILLIKEN for appellant.

I. G. MASON, G. T. FINN and G. W. ROARK for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

In the year 1917, H. L. Dawson was the owner of a farm in Logan county known as the "Simmons Place." Lee Taylor was a tenant of Dawson and had been in possession of the place for several years. He also had a verbal contract with Dawson for the rent of the place for the year 1918. In the month of October, 1917, L. E. Halcomb approached Dawson with the view of purchasing the farm. Halcomb stated to Dawson that he wanted possession on January 1, 1918. Dawson replied that the place was rented for that year to Lee Taylor, and that he would not sell the place unless satisfactory arrangements could be made with Taylor. Thereupon, they called on Taylor and, after some discussion, Halcomb agreed to give Taylor \$500.00 to surrender possession on January 1st. After this arrangement was made, Dawson and Halcomb entered into a written contract by which Dawson was to sell the farm to Halcomb for \$100.00 an acre and deliver possession on January 1, 1918. The contract contained the further provision that if either party should fail to fulfill his part of the contract, the one so failing should pay the other the sum of \$500.00 as a forfeit. On the same day, Halcomb and Taylor entered into the following contract:

"This contract made and entered into by and between L. E. Halcomb of Woodburn, Ky., party of first part, and Lee Taylor of Adairville, Logan County, Kentucky, party of the second part.

"On account of said second party having made a trade with H. L. Dawson to live upon the farm known as the Simmons place for the year 1918, and said H. L. Dawson having sold same to said L. E. Halcomb, the said Halcomb agrees to pay to the said Lee Taylor the sum of five hundred dollars (\$500.00) for possession of said place, same to be given on or before January 1st, 1918, and all contracts said Taylor has with said Dawson for tending the Simmons place for year 1918, to be cancelled when possession is given."

In the month of December, Taylor vacated the premises and surrendered the possession, and notified Halcomb that he had done so. Halcomb did not take possession thereof, as Dawson elected to pay him the forfeit of \$500.00 and not carry out the contract of sale.

Taylor sued Halcomb to recover on the contract. From a verdict and judgment in favor of Taylor, Halcomb appeals.

Halcomb insists that he was entitled to a peremptory instruction on the ground that there was no consideration for the contract. In support of this position it is argued that Taylor's oral contract for the lease of the land for a term of one year from a future date was a contract not to be performed within one year, and was therefore within the statute of frauds; also that the assignment of the lease was invalid because the term thereof was less than two years and Dawson did not consent in writing to the assignment. That being true, neither the lease nor its assignment was of any value, and there was nothing to support the contract sued on. In our opinion neither the validity of the lease between Taylor and Dawson, nor the validity of its assignment, has anything to do with this case. Halcomb desired to purchase the farm and to take possession on January 1, 1918. Taylor was in possession, and his right to continue in possession was recognized by Dawson. Dawson would not sell and agree to give possession on January 1, 1918, unless satisfactory arrangements could be made with Taylor. The contract provides, "Said Halcomb agrees to pay to the said Lee Taylor the sum of five hundred dollars (\$500.00) for possession of said place, same to be given on or before January 1st, 1918, and all contracts said Taylor has with said Dawson for tending the Simmons place for year 1918, to be cancelled when possession is given." In other words, Halcomb agreed to pay the \$500.00 not for an assignment of the lease, nor for the purpose of acquiring any rights thereunder, but solely for the purpose of obtaining possession of the farm by January 1, 1918, and putting an end to Taylor's rights under the lease. It is therefore clear that the lease formed no part of the consideration for the contract sued on, and it is immaterial, so far as Halcomb is concerned, whether it could have been enforced against Dawson or could have been assigned without his written consent.

Dawson's election to pay the forfeit of \$500.00 rather than convey the farm to Halcomb in no wise affected the contract between Halcomb and Taylor, as the contract was not conditioned on anything that Dawson might do or fail to do. Manifestly, the agreement to surrender the possession was a sufficient consideration for Halcomb's promise to pay the \$500.00 and when Taylor surrendered the possession in conformity with the contract, he thereby became entitled to the consideration which Halcomb had agreed to pay. It follows that the peremptory was properly refused.

Judgment affirmed.

Hines, Director General of Railroads v. Denny.

(Decided February 8, 1921.)

Appeal from Pulaski Circuit Court.

1. **Damages—Conjectural or Speculative Damages.**—Damages which are so conjectural or speculative as to be incapable of approximately accurate ascertainment or so remote and contingent that the parties affected could not reasonably have contemplated they would result, are not recoverable.
2. **Railroads—Action for Recovery of Value of Sample Cases and Samples.**—In an action by a traveling salesman to recover of a railroad company damages for the loss, through its negligence, of his sample cases and samples, the recovery may include the reasonable value of the property lost, and, if working on a salary, such loss thereof, if any, as he may have sustained by being deprived of the sample cases and samples and while unable by reasonable effort and care to replace them. But he will not be entitled to recover, by way of damages, for any loss of commissions on sales of merchandize he might have made during the time he was deprived of the sample cases and samples, as such damages are purely conjectural and speculative.

WM. and B. L. WADDLE for appellant.

H. C. KENNEDY and WM. CATRON for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Granting appeal, affirming in part and reversing in part.

The appellee, A. S. Denny, a traveling salesman of Isaac Fallers Sons Company of Cincinnati, Ohio, jobbers of men's and ladies' furnishing goods, instituted this action in the Pulaski circuit court against the appellant,

Walker D. Hines, then Director General of Railroads in the United States, to recover damages resulting from the alleged loss of certain sample cases and contents, owned and used by appellee in his business as traveling salesman, alleged to have been delivered to the Cincinnati, New Orleans and Texas Pacific Railroad Company at its depot in the city of Somerset, Kentucky, for shipment as baggage. It was alleged in the petition that the sample cases and contents were lost by and through the negligence of the railroad company and its servants; that the lost property was reasonably worth \$156.55, and it took appellee two months to replace same with other like sample cases and samples, during which time he was unable to engage in his usual or other business and made no sales of merchandize; and that but for such negligence of the railroad company and its servants, he would have sold during the two months of lost time to retail merchants of the territory traveled by him merchandize amounting to \$10,000.00, upon which he would have realized under the contract he had with his employer commissions, over and above his traveling expenses, aggregating \$400.00, and for this amount and \$156.55, the alleged value of the sample cases and contents, all claimed by way of damages, judgment was prayed in the petition.

The appellant's answer fully traversed the allegations of the petition, and on the issues thereby made the case went to trial, which resulted in a verdict awarding appellee damages of \$156.55, for the value of the sample cases and contents lost, and \$300.00 for his loss of commissions on sales of merchandize claimed to have been caused thereby. The separate finding as to the first item of damages was directed by an instruction of the court, but that as to the second item of damages was left to the decision of the jury under another instruction defining the measure of such damages, if any were allowed, and telling them to determine from the evidence whether same or any part thereof should be allowed. Appellant duly filed in the court below a motion and grounds for a new trial, but the motion was overruled and judgment entered upon the verdict in conformity with its findings. Complaining of the judgment and desiring a review thereof by this court, the appellant, as required by law where the amount in controversy is as much as \$200.00, and less than \$500.00, filed therein a transcript of the record and with it a motion that he be granted an appeal.

It seems to be conceded by counsel for appellant that so much of the verdict of the jury as allowed appellee damages of \$156.55, as the reasonable value of his lost sample cases and samples, should not be disturbed. So this feature of the case will not be discussed further than to say, that as the delivery of the property in question to the Cincinnati, New Orleans and Texas Pacific Railroad Company at Somerset for shipment, its loss by the latter and that its value reasonably amounted to \$156.55, were shown by the uncontradicted testimony of the appellee, the only witness testifying on the trial, the correctness of the verdict in awarding him the item of \$156.55, and that of the court's instruction directing its allowance by the jury, cannot be questioned.

It is, however, insisted for appellant that the recovery by appellee of damages for any loss of commissions on sales of merchandize it was claimed he might or could have made during the time he was deprived of his samples, was unauthorized by law because such damages are wholly conjectural or speculative; and that if the recovery of such damages should in any state of case be permitted, there was not sufficient proof thereof in the instant case to authorize the submission of the question to the jury. Hence, it is argued by counsel that the trial court erred in submitting that issue to the jury, and, also, in giving instruction No. 2 by which they were permitted to determine appellee's right to such damages and illegally allow him same to the amount of \$300.00.

The instruction was objected to by appellant's counsel and the action of the court in overruling the objection and giving the instruction excepted to by them. They did not, however, as properly they might have done, ask a formal instruction peremptorily directing a verdict for the appellant as to the damages claimed for loss of commissions, but offered one of substantially the same legal effect, which, if given by the court and followed by the jury, necessarily would have induced a verdict relieving the appellant of such damages. The court refused the instruction, however, to which appellant took an exception, and in view of the action of counsel referred to, it cannot be claimed that appellant is estopped to complain, on appeal, that the action of the trial court in submitting to the decision of the jury appellee's claim to damages for loss of commissions, is reversible error.

Before taking up the question whether or not contemplated profits, such as were allowed appellee in this case

by way of damages, are recoverable, it will be necessary to consider the evidence introduced in support of his claim to such damages. It appears from the evidence, furnished by the testimony of appellee alone, that the territory allotted him by his employer, within which to sell the merchandize, embraced Pulaski and about four other counties, through which he traveled during certain seasons of each year making sales to retail merchants, effected by exhibiting his samples to the purchasers, agreeing with them upon prices and taking their orders for such goods as they agreed to purchase and later receive by shipment from Isaac Fallers Sons Company from Cincinnati after the orders were received and accepted by the latter; that appellee was acquainted with the retail merchants of the territory in question and had an established trade therein, and that during the two months deprivation of his samples, caused by their loss at the hands of appellant's agents, he would or could, had they been in his possession, reasonably have sold to the retail merchants of his territory merchandize amounting to \$10,000.00, upon which he would have received, under his contract of employment with Isaac Fallers Sons & Company, a commission of 7½ per cent, amounting to \$750.00, after deducting from which his traveling expenses for the same time, \$350.00, he would have realized a net profit of \$400.00.

An analysis of the evidence will demonstrate the vagueness of that part of it bearing on the appellee's claim of damages for the loss of commissions. Notwithstanding his claim of having an established trade in the territory traveled by him, he failed to give the names of the retail merchant customers or any of them therein to whom he would, or could with reasonable certainty, have sold goods during the two months he was deprived of his samples; nor did he claim to have been informed or assured by any merchant of his territory that a visit from him within that time, attended by an exhibition of his samples, would result in a purchase of goods from him by such merchant. It will also be seen that the evidence fails to show what quality or amount of goods appellee customarily sold to each or any of the several merchants in his territory during any other like season and within such time as he was deprived of his samples; nor was any merchant of the territory called on to testify whether, if visited by appellee and shown his samples at any time within the two months succeeding their loss,

he would have given an order for merchandize. Furthermore, his estimate of the amount of merchandize he could have sold while deprived of his samples, was based on his estimate of the amount he sold in the succeeding year, 1919, without any proof from him or others that trade conditions that year in the territory traveled by him were the same as the year before, or what differences, if any there were, between the styles, prices of, or demand for the lines of merchandize sold by appellee in the year 1919 and those he claimed to have been prevented, by the loss of his samples, from selling in 1918. All that has been said of the uncertainty of the evidence respecting sales of goods appellee claimed would have been made by him but for the loss of his samples, applies with equal force to his testimony as to the amount of his traveling expenses, to be deducted from commissions, for the time he was deprived of the samples and might have been earning them, for instead of furnishing an itemized statement of these expenses or giving them by way of a daily average, he contented himself with a lump estimate by fixing them at \$350.00.

It is apparent from what has been said of the proof in this case that the damages claimed by appellee for the loss of commissions were and are too remote and conjectural to be accurately, or even approximately, ascertained. If appellee had been working upon a salary, instead of a commission, the damages claimed as resulting to his business from the loss of his samples could have been certainly ascertained, for in such case the measure of damages would have been the loss of his salary during the time he was deprived of the samples, which easily was susceptible of proof; but where, as in the instant case, the damages are claimed to have resulted from the loss of commissions on anticipated sales of merchandize to be made by personal effort in a particular territory, it is difficult, if not impossible, by any sort of proof to show the damages otherwise than conjectural or speculative, and therefore not recoverable. This is necessarily so because the number and amount of such sales depend upon many contingencies, such as the suitability of the goods to the market, fluctuations of trade and the skill, energy and industry of the traveling salesman. In addition to the numerous elements of uncertainty in the way of a correct ascertainment of such damages, referred to, is yet another arising out of a usage of commercial trade as appertaining to the business of the traveling sales-

man, which is that his sales of merchandize are made subject to the approval of his employers, for he makes no personal deliveries of the goods he sells and receives no money for them, but takes orders from the purchasers for them, which he forwards to his employer for the latter's acceptance or rejection. If an order is accepted by the employer the goods are shipped to the purchaser and the money therefor sent or paid by the purchaser to the employer as provided by the contract of sale. On the other hand, if the order is rejected by the employer, the giver of same is advised of that fact and the goods ordered are not shipped to him. It does not appear from appellee's testimony what proportion, if any, of the orders he was accustomed to take for goods were rejected each or any season by his employer, or that his commissions on sales of goods he reasonably could have made, but for the loss of his samples, would not have been lessened by his employer's rejections of such orders from customers. The legal effect of the usage of trade referred to as related to the business of the traveling salesman and his customers, has repeatedly been passed on by this court. In considering it in *Nolin Milling Co. v. White Grocery Co.*, 168 Ky. 417, we in part, said:

"In dealing with a drummer one cannot assume that he has implied authority to make an absolute sale of the article or commodity he handles; but must know that in the absence of special authority to do so, he can do no more than merely solicit and transmit the order and leave to his principal the right to accept or reject it, the approval of the latter being necessary to complete the sale. Appellee has not shown that appellant's drummer, Chandler, had special authority to bind his principal, and in the absence of such showing, the writing given its president and manager by Chandler is no more evidence of a completed contract than would be a mere order for the flour written in the form customarily employed by drummers in such transactions; and in no event can it be considered as anything more than a tentative sale, which could not become binding unless accepted or approved by appellant, which was never done."

It will be found that the following additional authorities hold to the same view of the law as to such contracts expressed in the opinion, *supra*. *Courtney Shoe Co. v. Curd and Son*, 142 Ky. 219; *Charles Brown Grocery Co. v. Beckett, etc.*, 22 R. 393; *Seven Hills Chautauqua Co.*

v. Chase Bros. Co., 26 R. 334; John Mathews Apparatus Co. v. Reuz and Henry, 22 R. 1528.

The law regarding the recovery of damages for loss of commissions or future profit, whether resulting from a breach of contract or arising out of a tort, is also well settled in this, as in other jurisdictions. In all cases the damages claimed must be such as are directly and proximately caused by the breach or injury, and also such as in the contemplation of the parties could reasonably have been anticipated. Moreover the damages claimed should be capable of being definitely ascertained. Where they are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof, no recovery can be had. 13 C. Y. C. 36. As already intimated, the evidence in this case as to the loss of commissions by appellee is based upon too many contingencies, is too general and indefinite to admit of an approximately accurate ascertainment of the character or amount of the damages claimed and also wholly insufficient to show that they were or are of such a character as could have been contemplated by the parties; nor was it made to appear that the servant of the railroad company who received the appellee's baggage or any of them who had it in charge or by whom it was lost, knew that it contained samples or of the use appellee intended to make of them.

We frequently have held that damages of the character here claimed are purely conjectural and speculative and hence not recoverable. In *Weick v. Dougherty*, 28 R. 930, we approved the plaintiff's recovery of the defendant, by way of damages, the value of his wagon and contents, which the latter negligently allowed to be destroyed by fire while in his livery stable, but condemned the action of the trial court in permitting the plaintiff also to recover of the defendant damages for the loss of profits in his business as a huckster, claimed to have been caused by the destruction of the wagon; it being held that such damages were too remote and speculative to be the subject of judicial ascertainment. In *Tucker v. Horn*, 31 R. 806, the plaintiff, a jockey, was employed by the defendant as a race rider, the contract of employment providing that he might, when not riding for the defendant, accept outside mounts and receive the wages therefor. Claiming that the contract had been breached by the defendant, the plaintiff sought by suit to recover of him damages therefor, including wages, it was claimed,

he would have made from outside mounts had the contract not been breached. We held that such damages could not be recovered by the plaintiff because too remote and speculative, and in so declaring, in part, said: "It seems to us unreasonable that a jury should be allowed to say at haphazard, who might or might not have employed the infant plaintiff to ride their races during the contract period. Undoubtedly it is true that jockeys whose employers have no entry in a given race are sometimes engaged by other owners who are in need of riders, but that this will happen is entirely problematical."

A very recent case analogous in principle to the instant case is that of *Turpin v. Jones*, 189 Ky. 635. In this case we held that a share cropper in an action for damages brought against his landlord before the time for pitching the crop and immediately following the refusal of the landlord to surrender to his possession as a renter for the year, the land to be cultivated by him could not recover of the landlord by way of damages, conjectural profits that he might realize from the cultivation of the land. The same conclusion on similar states of fact was also reached in the cases of *Smith v. Philips*, 16 R. 615, and *Owens v. Durham*, 5 Dana 536. In 8 Am and Eng. Ency Law, 624, (2nd Ed) it is said:

"It has been held that profits which might have been realized by an agent to sell goods on commission are too uncertain to be recoverable. The opinion of an agent selling on commission as to what sales he could probably have made, but for the breach of contract, does not sufficiently warrant the damages."

The following cases in other jurisdictions than ours sustain the above doctrine: *Katz v. Cleveland Ry. Co.*, 91 N. Y. Supp. 720; *Brigham v. Carlisle*, 56 Ala. 243; *Conheim v. Chicago Great Western Ry. Co.*, 124 Am. State Rep.'s 623. We are aware that cases may be found, one or two of which are cited by appellee, in which it was held that recovery might be had of lost profits, but in every such case the loss was in contemplation of the parties and the damages could be ascertained with reasonable certainty, neither of which conditions exists in the instant case.

If right in the conclusions we have reached, it follows that the trial court, instead of submitting to the jury the question of damages for loss to appellee of commissions as predicated in instruction No. 2, should have instructed them to return a verdict disallowing such dam-

ages; and because of this error, the judgment, in so far as it awards appellee such damages, is reversed and cause remanded with directions to set aside the verdict and judgment to that extent and grant appellant a new trial. But the judgment, in so far as it awards appellee damages for the value of the sample cases and samples, is affirmed.

Mobley v. Commonwealth.

(Decided February 8, 1921.)

Appeal from Carter Circuit Court.

1. **Criminal Law—Indictment Improperly Charging Separate Offenses.**—Although an indictment may improperly charge the defendant with the commission of two or more separate offenses, where the attorney for the Commonwealth elects to prosecute him for only one of the offenses and his trial is confined to that single offense an error committed by the trial Court in overruling, before such election by the Commonwealth, his demurrer to the indictment was not prejudicial to him.
2. **Criminal Law—Period of Imprisonment Directed by Instruction.**—An instruction which erroneously told the jury that the minimum period of imprisonment in jail fixed by the statute for the offense for which the defendant was tried was less than actually prescribed by it, was not prejudicial to him, as the verdict of the jury fixed his imprisonment at the minimum time named in the instruction.
3. **Criminal Law—Imprisonment for Less Time Than Fixed by Statute.**—The fact that the verdict of the jury, in addition to inflicting upon the defendant a fine as prescribed by the statute, fixed his imprisonment at a shorter time than the minimum limit prescribed by the statute, did not entitle him to a new trial, as he cannot complain that his imprisonment was less than that fixed by the statute; and an error, though committed both by the trial Court and jury, which did not prejudice the defendant in some substantial right, will not afford ground for reversing the judgment.
4. **Intoxicating Liquors—Evidence.**—Evidence examined and held sufficient to authorize the verdict finding defendant guilty of furnishing and selling intoxicating liquors in violation of section 2557, Ky. Stats.

THEOBALD & THEOBALD for appellant.

CHAS. I. DAWSON, Attorney General, and **THOMAS B. MCGREGOR**, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This appeal is prosecuted from a judgment of the Carter circuit court entered upon a verdict finding the appellant, Charles Mobley, guilty of procuring for and selling Bill James spirituous, vinous and malt liquors, in territory where local option was in force, and fixing his punishment at a fine of \$60.00 and ten days' confinement in jail.

The indictment contained much surplusage, but sufficiently, we think, charged the offense of selling such liquors in violation of Kentucky statutes, section 2557, though improperly joining two sales, each to a different person, in the one indictment. Because of this defect of misjoinder of offenses, the trial court should have sustained the appellant's demurrer to the indictment, but as the Commonwealth elected to prosecute appellant for the offense of selling to James, the error of the court in overruling the demurrer was not prejudicial to him for the election compelled the treating of any other offense or offenses charged in the indictment as surplusage. *Ellis v. Commonwealth*, 78 Ky. 133.

We do not understand that the appellant complains of the overruling of the indictment, but he contends: (1) that the indictment is otherwise duplicitous in embracing offenses denounced by several different statutes; (2) that the verdict is flagrantly against the evidence; and (3) that the court did not properly instruct the jury. The first of these contentions may again be answered by saying that stripping the indictment of all surplusage, as seems to have been done on the trial by confining the evidence to the selling and furnishing of liquor by appellant to James, the Commonwealth was limited to an offense under section 2557 Ky. Stats. The second contention cannot be sustained, for the evidence was sufficient to support the verdict. As furnished by the testimony of the witness James it conduced to prove that appellant with one Gallion was in possession of several quarts of moonshine whiskey which he admitted to James was contained in saddle pockets belonging to him; and when asked by James whether he could sell or find him a quart of whiskey, appellant conducted him to Gallion and upon reaching the latter appellant drew from under a bank where it was concealed the saddle pockets containing the whiskey, from which James purchased a quart for which he paid \$7.00. James also testified that

he was handed the whiskey either by appellant or Gallion, he does not distinctly remember which; that he paid the money for the whiskey either to appellant or to Gallion, but as to which of them received it his recollection was indistinct. He further testified that he later saw both appellant and Gallion up the road from where he had purchased his whiskey and that both were still in possession of it and the witness saw sales made of it to other persons but did not himself buy any more whiskey that day, nor notice by whom the later sales were made. It is true this evidence was contradicted by appellant throughout, but it was the province of the jury to disbelieve appellant and accept the testimony of James, and as this was evidently done by them and the evidence furnished by James if believed strongly tended to connect appellant with the possession, ownership and sale of the whiskey, we are unprepared to say that the circumstances were not sufficient to convince the jury of appellant's guilt. *Couch v. Commonwealth*, 171 Ky. 146.

In determining the purpose of the defendant in a case like this the jury were not confined to his testimony alone but had a right to take into consideration all the facts and circumstances surrounding the transaction. *Peters v. Commonwealth*, 154 Ky. 689.

The only error we find in the instructions given by the court lies in the advice given in the first one to the jury regarding the imprisonment penalty they were authorized to inflict if they found appellant guilty, the mistake consisting in its telling the jury that in addition to the fine of not less than sixty nor more than one hundred dollars they might impose a penalty of confinement in jail for not less than ten nor more than forty days, whereas the minimum imprisonment fixed by the statute is twenty instead of ten days. This error in the instruction was harmless, because certainly not prejudicial to the appellant who cannot complain that the verdict gave him less than the minimum imprisonment provided by the statute. *Read v. Commonwealth*, 138 Ky. 568; *Miracles v. Commonwealth*, 148 Ky. 464. A defendant cannot complain of an error which does not prejudice him in some substantial right, and, as declared in 8 R. C. Law 238, "It is generally conceded that a sentence which is for less than the statute prescribes is not void, but merely erroneous and not a good ground for reversal."

As we find no sufficient cause for disturbing the verdict, the judgment is affirmed.

Sparks v. Sparks, et al.

(Decided February 8, 1921.)

Appeal from Jessamine Circuit Court.

Appeal and Error—Dismissal.—An appeal, by a party who has been granted in the lower court the whole relief which he sought, is unauthorized, and will be dismissed by this court on its own motion.

BRONAUGH & BRONAUGH for appellant.

Appellees not represented on appeal.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Dismissing appeal.

R. M. Sparks instituted this action in September, 1919, in the Jessamine circuit court against H. C. Sparks, and Maggie C. Sparks, trustee for H. C. Sparks.

The petition alleges that the plaintiff procured a judgment against the defendant, H. C. Sparks, execution upon which was levied upon a certain tract of land as the property of H. C. Sparks whereby he secured thereon an execution lien.

It is further alleged that in 1902 the said H. C. Sparks executed a deed for said land to E. R. Sparks; that there was no consideration for the execution of the deed other than the agreement of E. R. Sparks to convey the property described therein as the said H. C. Sparks might direct; that thereafter, pursuant to the obligations and agreement mentioned in the deed, E. R. Sparks did convey the same to the defendant, Maggie C. Sparks, trustee, to be held by her in trust for her son, H. C. Sparks, during his life, and in remainder to his children, with the condition that the said H. C. Sparks should have no power whatever to sell, mortgage or in any wise encumber the property, and that the same should not be liable for the debts of the said H. C. Sparks, and that if any attempt was made to subject the property to the debts of the said H. C. Sparks by execution, attachment, or judgment of court, or any legal proceeding whatever, all his interest therein should cease and vest in the children of said H. C. Sparks then living, or that might thereafter be born; that at the time of such deed the said H. C. Sparks had one child, John W. Sparks, but that said John W. Sparks died in 1917 while an infant, unmarried

and childless, and that said H. C. Sparks had never had any other children.

He prayed that H. C. Sparks should be adjudged the absolute owner in fee simple of the land described, and that he be adjudged a lien thereon by reason of the levy of his execution, and that the same be enforced and a sale thereof had.

The defendant, Maggie C. Sparks, answered admitting all the allegations of the petition and of the answer and cross petition of H. C. Sparks hereafter mentioned, and alleged that at no time since the execution of the deed from E. R. Sparks to her as trustee had she ever assumed any control of or possession of the property therein described, and that she did not now claim any interest therein as trustee or otherwise, and joined in the prayer of the petition and the cross petition of H. C. Sparks.

H. C. Sparks filed his answer, which he made a cross petition against Maggie C. Sparks, trustee, and alleged that at the time of the execution of the two deeds he was a young man who had shortly theretofore arrived at his majority, and that at the solicitation and instigation, and by the persuasion and under the influence of the said E. R. Sparks, who was his uncle, and of the said Maggie C. Sparks, who was his mother, and without any consideration, and for the sole purpose, as he then thought, of protecting his said property from being subjected by his creditors, executed said deed to E. R. Sparks and suffered said E. R. Sparks to make the deed of trust to Maggie C. Sparks with the conditions and the limitations therein expressed; that the true meaning of said conveyances was not known to him at the time or until the land was sought to be subjected to the plaintiff's debt; that his uncle and mother acted in the premises with the best intentions but that it was unwise for them to have so acted and have the deeds drawn as they were, and that he, on account of his youth and inexperience at the time, suffered said deeds to be made under a misunderstanding as to their effect, he at the time being a young man of unstable habits, but says that he is now nearly forty years of age and settled in his habits and business; that he had no intention by the deed to Sparks to dispose of his interest in the land, and has never received any compensation therefor, and has at all times retained control over said property, and the said Maggie C. Sparks has never at any time assumed control thereof. He asked

that the deeds to E. R. Sparks and Maggie C. Sparks, trustee, be adjudged null and void and that he be adjudged the owner of the fee in the property described.

The action was submitted to the circuit court on the pleadings, no evidence having been taken, and a judgment was entered therein declaring null and void the two deeds mentioned, and adjudging H. C. Sparks to be the owner in fee of the property described. It was further adjudged that R. M. Sparks had acquired a lien on the property by his execution levy, and a sale thereof to satisfy the same was ordered.

No party to the action excepted to the entry of this judgment, but at the foot thereof it was ordered that an appeal be granted to plaintiff or defendant.

The plaintiff, R. M. Sparks, filed a transcript in this court wherein he is designated as appellant and H. C. Sparks and Maggie C. Sparks, as trustee, are designated as appellees.

The parties filed in this court an agreed order or motion that the case be immediately filed and placed upon the docket and advanced for hearing, and heard upon the record as it stands and the brief of appellant, and stating that the appellees did not desire to file any brief.

There is on file, however, with the transcript a brief designated "brief for appellant," but which brief asks for the affirmance of the judgment.

Each of the three parties to this record received by the judgment of the circuit court the very relief which he sought, and no one of them is complaining of it.

It was adjudged at the instance of R. M. Sparks, and according to the prayer of his petition that H. C. Sparks was the owner in fee simple of the tract of land involved, and that he, R. M. Sparks, had a lien thereon, which was adjudged to be enforced.

It was adjudged for H. C. Sparks, in accordance with the prayer of his answer and cross petition that the two deeds in question were null and void and that he was the owner in fee of the tract of land described therein; and it appears that Maggie C. Sparks disclaimed any interest whatsoever in the land as trustee or otherwise, and she therefore cannot and does not complain of anything in the judgment.

Under these circumstances R. M. Sparks, whose relationship, if any, to the other parties does not appear, files the transcript in this court as appellant.

It is apparent that there is no *bona fide* controversy between these parties, or any two of them, as to the correctness of the judgment of the circuit court, and they are here in the attitude of asking this court to further pass upon a controversy that has already been passed upon by a court of competent jurisdiction just exactly as they each desire it.

This court, in the exercise of its authority to protect itself from unauthorized appeals, will, on its own motion, direct the dismissal of same. *Light v. Miller*, 187 Ky. 57.

Appeal dismissed.

Boone County v. Town of Verona, et al.

(Decided February 8, 1921.)

Appeal from Boone Circuit Court.

1. **Municipal Corporations—Creation, Alteration and Dissolution.**—The power to create, enlarge or dissolve a municipal corporation belongs exclusively to the legislative department of the government and cannot be exercised by the judiciary, nor can the legislature delegate such a function to the judiciary.
2. **Municipal Corporations—Dissolution of Municipal Corporations.**—The General Assembly may enact a general law for the dissolution of municipal corporations of the sixth class, and provide that it take effect upon a town of the class, when a number of its inhabitants shall accept its application, without unconstitutionally delegating the power to legislate.
3. **Constitutional Law—Application of Statute—Delegation of Authority.**—When the legislature enacts a statute, which is to take effect upon the happening of an event, or the existence of certain facts, it may authorize a court to ascertain the event or the existence of the facts, upon the existence of which the statute has application, and it will not thereby delegate to the court a legislative function.

B. H. RILEY for appellant.

JOHN L. VEST for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.

Verona is a municipal corporation of the sixth class. In pursuance to and in accordance with the provisions of section 3662a, Ky. Stats., a majority of the legal voters of the corporation petitioned the circuit court to annul

and dissolve its charter, and the notice of the filing of the petition was given as required by the statute, *supra*. There is no contention made but what the proceedings were regular and in accordance with the requirements of the statute. The facts averred in the petition as the cause of the desire of a majority of the voters to dissolve the corporation and annul its charter, was that the corporation had ceased to function for several years, and had no board of trustees, nor other officers. The court rendered a judgment in accordance with the prayer of the petition annulling the charter and dissolving the corporation, and adjudged that all of its franchises and powers be discontinued. The only source from which the court could derive authority for its action is to be found in the provisions of the statute, section 3662a, *supra*, as in this state the courts have no inherent authority to dissolve a municipal corporation. Section 3662a is as follows:

“1. A majority of the voters residing in an incorporated town of the sixth class may file a petition asking that its charter be dissolved and annulled.

“2. Whenever a petition signed by a majority of the persons entitled to vote living within the boundary of the proposed town is filed in the circuit court clerk's office of the county in which a greater part of the town is located, not less than twenty days before the commencement of the next regular term of said court, the petitioners shall cause notice of the filing of such petition and the object thereof to be published in two issues of some newspaper of general circulation published in the county; or, if none, by notices posted up for at least ten days before the commencement of the term. One at the court house door and the others at public places within the boundary of the proposed town.

“The petition shall set out the metes and bounds of the towns, and the number of voters and inhabitants resident within the boundary thereof, and such other facts as may be thought proper.

“3. A defense may be made to the petition by any voter of the town, and if a defense is made, the court shall hear and determine the same and may render judgment dissolving and annulling the charter.

“The pleadings and practice, except as herein provided, shall be the same as in equity cases; an appeal shall be from the judgment, provided the record is filed in the clerk's office of the court of appeals twenty days

prior to the second term of the Court of Appeals after the rendition of the judgment."

The contention is made for the appellant that the foregoing act of the General Assembly is void, because in violation of certain provisions of the Constitution. A very well settled principle, which has been continuously adhered to, is, that the General Assembly has the authority to enact any legislation, which is not prohibited by some provision of the Constitution of the state, or of the United States, and in this respect a difference arises between the powers of the General Assembly of the state and the powers of the Congress of the United States. The powers of the latter in legislation are confined to such things as it is authorized, by the provisions of the Constitution of the United States, to do. Cooley 7 ed. p. 241; *Griswald v. Hepburn*, 2 Duv. 20; *Rhea, treasurer, v. Newman*, 153 Ky. 604; *L. & N. R. R. Co. v. Herndon*, 126 Ky. 589; *Banks v. Commonwealth*, 145 Ky. 800. While there is no express warrant in the Constitution of the state for the enactment of the legislation contained in the act, *supra*, such warrant is in no wise essential to its validity, and hence if the General Assembly is not prohibited from enacting the legislation by a constitutional provision, it was wholly within its power to do so. Of course, it must be conceded, that if the General Assembly undertakes to make an enactment, which the Constitution prohibits, its action is stillborn and is without force or effect, and neither invests nor divests any one with or of either rights or powers.

There is no inhibition in the Constitution upon the power of the General Assembly to enact the act, *supra*, unless it is found in sections 27 and 28 of that instrument. Section 27 is as follows:

"The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those, which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 28, *supra*, is as follows:

"No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

It is insisted that the act under consideration undertakes to invest the judiciary with powers, and to impose

upon it duties, which are exclusively legislative in character, and that such action is prohibited by section 28 of the Constitution, *supra*, which expressly prohibits a judicial officer from exercising a power which properly belongs to the magistracy, which compose the legislative department, unless the legislation which attempts to authorize the exercise of the power in the language of the section, *supra*, is "expressly directed or permitted" by the Constitution. There being no provision of the Constitution which expressly directs or permits the courts to annul or dissolve the charters of municipal corporations, nor authorize the legislative department to empower the courts so to do, it is contended that the General Assembly was without power to delegate such authority to the judiciary, or its officers. Of the correctness of this contention, as a general rule, there can be no doubt, if the act of the legislature does in fact attempt to delegate a power, properly belonging to the legislative department, to the judicial, and undertakes to empower the judge of the circuit court to exercise it, for it necessarily follows that if the courts, and their officers, are prohibited from exercising a legislative function, the legislature is without authority to delegate such power to them. The General Assembly may authorize the courts to exercise judicial functions, but it is without authority to authorize the courts to exercise a legislative function, except in the instances wherein the Constitution "expressly directs or permits" it. Neither is there the least doubt, but what the creation and enlargement, and also the dissolution of municipal corporations are exclusively legislative functions, and may be exercised alone by the legislative department of the government. 19 R. C. L. 705; 12 C. J. 856; 28 Cyc. 250; Hill v. Anderson, 28 K. L. R. 1032; Boyd v. Chambers, 78 Ky. 140; Norris v. Waco, 57 Tex. 635; Wade v. Richmond, 18 Gratt. 583; Weeks v. Milwaukee, 10 Wis. 243; Powers v. Wood, 8 Ohio St. 285. Indeed there is no authority which advances a contrary view, that is, when applied to the real acts, which constitute the creation, enlargement or dissolution of a municipal corporation. The power to create municipal corporations, which are sub-divisions of the state, for the purposes of government, is held everywhere to be political in its character, and necessarily exercisable by the legislative department alone, and the dissolution of a municipal corporation is no less the exercise of a political power and must be exercised by the legislative depart-

ment of the government, and is not a matter of judicial cognizance. This general statement of principle does not conflict with the courts' authority, at the suit of the attorney general, by the direction of the legislature, to vacate the charter of a municipal corporation, as provided for by section 482 of the Civil Code. The municipal corporations there referred to are such as have essential defects in their organizations, and are not corporations *de jure*, but mere *de facto* corporations and assuming to exercise powers and franchises to which they have no right, and the questions the courts are called upon to decide and to adjudge, are whether or not the corporations are or are not real corporations, according to the laws upon which their organizations depend, and therefore the functions exercised by the courts in such cases are judicial in character, because the existence of a *de jure* municipal corporation is invulnerable to any assaults which may be made upon it in the courts. *Vanover v. Dunlap*, 172 Ky. 679.

There being no express direction or permission in the Constitution for the courts to exercise the power to dissolve a *de jure* municipal corporation, it seems clear that the legislature is without authority to delegate such a legislative function to the courts, and hence, the question in the instant case, to be determined, is whether the act of the General Assembly under consideration, has the effect of delegating to the circuit court the legislative function of dissolving a municipal corporation, or empowering the court with authority to determine the necessity or propriety for such a dissolution, or is the duty which the court is authorized to perform a judicial function, and thus within the legislative authority to bestow? Municipal corporations have been usually dissolved by direct legislative action—by special enactments repealing their charters, or by acts repealing the general law, under which they were organized—and hence, there has been but scant consideration of the question here presented, which grows out of the general law under which they may be dissolved. The Constitution makers provided in section 156 of that instrument, that the legislature should enact a general law for the organization of municipal corporations, but made no provision of any kind for their dissolution, being under the belief perhaps that the disestablishment of a town would never be desirable. It should be noted that the provision of the Constitution, *supra*, did not “expressly direct or permit” that the gen-

eral law for the organization of municipal corporations should require the approval of the circuit court before one should be organized, and hence, it was within the power of the legislature, while complying with the constitutional provisions, to have required a reference of the acts necessary, under the general law, to a non-judicial officer or tribunal, but the act, which is sections 3713 to 3716, inclusive, Ky. Stats., provided for the filing of a petition signed by at least two-thirds of the voters, who lived within the boundary designated for the corporation, and for due publication of such facts as provided for by section 3714, *supra*, and then provided that if no defense was made, the court should enter a judgment establishing the town. Defense might be made by any inhabitant of the proposed town, which the court should hear and determine, and render a judgment establishing the town or refusing to establish it "as may seem proper." It was, however, provided by the act, that, if the court should be satisfied that the required population existed within the designated boundary, and the required notice of the proceeding had been given, it was without discretion in the matter and should direct the establishment of the town. Whatever might be thought of the validity of this statute, if considered in a case of first impression, the act was expressly upheld when its validity was assailed in *Morton v. Woodford*, 99 Ky. 367, and referred to with approval in the later case of *Commonwealth v. Rose*, 105 Ky. 326. Since the enactment of that statute and the decisions of the courts, above referred to, many towns of the sixth class have been organized throughout the state, relying upon the validity of the statute, and it is now too late to disturb the effect of those decisions. No reasons were assigned in either of the opinions for the conclusions arrived at, but clearly the statute could be held as valid, upon no theory, except that the act granted a charter of incorporation and created a municipal corporation in any locality throughout the Commonwealth when two-thirds of the voters, within the locality, accepted the provisions of the statute or else the legislative authority was delegated to two-thirds of the voters in the locality, to create a municipal corporation, in the nature of the familiar authority given to the voters to create school districts and to impose taxes and to do many other things, which are permitted by the laws enacted by the legislature, and that the statute which was solely the act of the legislative department created

the corporation when the requisite number of voters had complied with its requirements, and that the acts of the court in determining that the requisite boundary was described and contained the required number of inhabitants, and that the required publication had been made, were not legislative in character, and that these acts if judicial were not what created the corporation, but, that the act of the Assembly had created it, when certain required events occurred, which constituted the acceptance by the voters of the terms and conditions, under which the corporation was created. It should, also, be observed that the terms of the act denied to the court the power to determine the political questions which would arise from a consideration of the propriety or necessity of establishing, or refusing to establish, the corporation. In the charters of the cities of the several classes, legislation is included for making annexations to the boundaries of cities, and striking territory therefrom, and these statutes have been held to be valid and not in derogation of any constitutional provision, because the act, of annexation or striking from the boundary, is actually made by the councils of the cities, to whom the legislative authority has been delegated, although in these statutes the courts are authorized to pass upon the sufficiency of the reasons for the annexation or striking from the boundary, as well as to determine whether the municipal authorities have complied with the statutory requirements in the proceedings. *Carrithers v. Shelbyville*, 126 Ky. 769; *Lewis v. Brandenburg*, 105 Ky. 21. In other jurisdictions a similar view has been entertained of similar statutes. *Henrico v. Richmond*, 106 Va. 282; *Emporia v. Randolph*, 56 Kans. 117; *Eskridge v. Emporia*, 63 Kans. 368; *Cullen v. Junction City*, 43 Kans. 627; *Forsythe v. Hammond*, 30 L. R. A. 582; 68 Fed. 774; *Grusmeyer v. Logansport*, 76 Ind. 549; *Burlington v. Leebuck*, 43 Iowa, 252. In the latter case, the court said: "It is the law itself which fixes the conditions of annexation and the office of the court is to determine whether the conditions so prescribed by the law have been complied with, and the functions performed by the court are judicial."

Reference is made herein to the construction placed by the courts upon the statutes which are general laws for the creation and enlargement of municipal corporations, for such light as they shed by analogy upon the construction to be placed upon the statute under consid-

eration, which is a general law for the dissolution of municipal corporations of the sixth class.

It has been held in this jurisdiction and in others, that the legislature may grant a charter to a municipal corporation, not to go into effect until accepted by a majority or some other number of its inhabitants, and under sections 3713 to 3716, inclusive, *supra*, a charter is granted for the organization of a town when two-thirds of the voters, in a designated area, shall accept it by filing their petition and giving certain publication required by the statute. These statutes, and similar ones, have been upheld as not amounting to the unconstitutional delegation of legislative authority. *Carrithers v. Shelbyville, supra*; *Morton v. Woodford, supra*; *Cooley's Constitutional Limitations*, chap. 5, p. 143, and cases cited in the note thereto. If a charter may be granted upon its acceptance by the voters in a locality and that does not amount to an unjustifiable delegation of legislative authority, why may not the legislature dissolve a municipal corporation by a legislative act conditioned upon the dissolution being accepted by a majority of the voters of the town? We think it may do so. 28 Cyc. 252. *Cooley* says: "A statute may be conditional and its taking effect may be made to depend upon a subsequent event." When the event transpires, the statute takes effect and the fact that the event was the judicial finding of the existence of the events upon which the statute should take effect, would not prevent the result of the statute being a legislative act.

As said in *Clarke v. Rogers*, 81 Ky. 43, "The legislature cannot delegate its powers to make laws, but when enacted, whether or not the law shall become operative may be made to depend upon the popular will." The condition upon which such a law takes effect is that the people of the locality to be affected, accept it, but, such act of acceptance is not necessarily an exercise of legislative power. Under our system, which is required by subsection 29, of section 59, of the Constitution, that no special act of the legislature shall be enacted, when a general law upon the subject is available, there must be created in the general act, some method of ascertaining when the law is accepted, which will give force and permanency and publicity to the act of acceptance. Whether this section of the Constitution has application to the dissolution of municipal corporations is unnecessary to be decided, but there can be no question, but what the

legislature has authority to enact a general law upon the subject, provided it does not delegate to the executive or judicial departments of the government, the power to dissolve the corporation. If the legislature may create or dissolve a municipal corporation, dependent upon the will of a majority or two-thirds of the legal voters of it, to be ascertained by an election, why may it not make the dissolution dependent upon the will of a majority or two-thirds of the inhabitants when ascertained in some way, other than an election—that is, when the fact is ascertained by the judgment of a court. Probably no other tribunal is so well able to ascertain the existence of the facts, upon which the effect of the statute is conditioned. In the general laws providing for annexations and striking from the boundaries of towns and cities, as will be observed, the legislature has delegated the legislative power to make the annexations or reductions, to the city councils, but, their ordinances upon the subject are made to depend upon the judgment of the circuit court, as to the existence of certain facts and conditions, and these facts and conditions must exist before the ordinances take effect. It is not apparent, that the principle there involved is any different from that in the instant case, where the act is conditioned to become effective, when the court shall adjudge, that a majority of the voters of the town have accepted the terms of the act, by the proceedings required by it. In view of the fact, that a court is wholly without authority to dissolve a municipal corporation and such authority can not be conferred upon it by the legislature, it is apparent that the effective power, which dissolves a corporation, under the statute under consideration, is the legislature and not the court, and while the acts of the court are judicial, they do not effect the dissolution sought, except to the extent that the facts are found to exist, upon which the legislative action takes effect. Neither can the contention, that the judgment of the court annulling a charter and dissolving a municipal corporation upon a finding of the facts to exist, which dissolve it under the law, is legislative in its character, be reconciled with the adjudication, that the judgment of the court establishing a town, as the result of the existence of the facts, which under the law incorporates it, is not legislative in its character, and the acts, if judicial are not the power which created the corporation. In the complex conditions of our society many governmental agencies are necessary, and often the line,

between the executive, legislative or judicial powers entrusted to them and the powers of another department, is so shadowy, that it is scarcely distinguishable, and it is not our duty to declare an act of the legislature unconstitutional, unless there is no solid ground upon which to adjudge it otherwise.

The reason assigned by the citizens of Verona for desiring the disestablishment of their town is immaterial, and we can not presume, that such suggestions influenced the finding of the court, as the doctrine is well established, that a municipal corporation is not dissolved, because of non use of its corporate franchise, but, can only surrender its corporate existence with the consent of the legislature. *Hill v. Anderson, supra.*

Applying the foregoing doctrines by analogy, to the instant case, the statute under consideration, dissolved every municipal corporation of the sixth class, when a majority of the voters therein, accept the effect of the statute, by signing a petition, expressing a desire that the statute take effect upon their town, describing it by metes and bounds, and stating the number of voters and inhabitants therein; file same in the clerk's office of the circuit court, and give publication of the fact and its purpose as required by the statute. Any voter of the town may defend the action, but, the only defenses available to him would be that a majority of the voters were not subscribers to the petition, or the petitioners had not complied with the statute in its preparation or publication. The issues upon those facts would be the only questions for adjudication. The duty of the court would be only to ascertain that the facts existed, upon which the legislature conditioned, that the act should apply to that town. If the facts exist, the court so adjudges. The acts of the court would seem to be judicial, but its judgment is the condition upon which the taking effect of the legislative act was predicated. The court does not adjudicate upon the necessity or political propriety of dissolving the corporation and hence does not exert any legislative power or function. It merely finds the facts to exist which show that the statute applies, and has taken effect, and the act of dissolution is in fact the act of the legislature. The act under consideration is not therefore in derogation of the Constitution and the judgment is affirmed.

All the members of the court sitting.

Capital Laundry Co. v. McRoy's Guardian.

(Decided February 11, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Fourth Division).

Master and Servant—Action for Personal Injuries—Contributory Negligence.—In an action by a girl 17 years old for damages for injury to her hands which were caught and burned between the rollers of a mangle in appellant's laundry, held that she was not guilty of contributory negligence in momentarily forgetting the dangerous character of her work, and thoughtlessly turning her eyes aside when something happened in the room to distract her, thereby allowing her hands to be drawn into a machine her employer had put her to operate, knowing the safety device with which it was equipped was not in working order, except for which the accident could not have happened.

BLAKEY, DAVIS & LEWIS for appellant.

EDWARD G. HILL, ROBT. L. PAGE, CHAS. F. OGDEN and
DAVIS, PAGE & DOWNING for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Fay McRoy, in whose behalf this action is prosecuted by her statutory guardian, became seventeen years of age in January, 1917. She was employed to operate a handkerchief mangle by defendant, now appellant, in January, 1918, and while so engaged about a month later was permanently injured by having her hands caught and horribly burned between the rollers of the mangle.

The defendant concedes there was sufficient evidence of causal negligence upon its part to carry that question to the jury and that same was properly submitted by the instructions, and it does not question the size of the verdict, but for reversal insists only that the court erred (1) in not finding, on its motion for a directed verdict, that Miss McRoy, whom for convenience we shall call plaintiff, was guilty of contributory negligence as matter of law, and (2) in refusing to give a concrete instruction on that question.

The same facts are relied upon to sustain both contentions and were stated in a separate paragraph of the answer as a specific plea of contributory negligence thus:

“Further answering herein, defendant states that plaintiff, Fay McRoy, at the time of the accident complained of herein, knew that one of the rolls of said iron-

ing machine was heated and would burn her hand if it touched same; knew further that the two rolls of said ironing machine were so close together that if she permitted her hand or hands to be caught between same, her said hand or hands would be tightly held against said heated rolls; knew that said rolls were revolving in the usual manner for the purpose of ironing handkerchiefs and other articles such as were ironed upon said machine; knew that the brick which had been placed between the frame of said machine and the pedal thereof was then keeping, and would continue to keep the rolls above referred to close together and revolving; and with full knowledge of the above stated facts, said plaintiff, Fay McRoy, attempted to rearrange the covering on the lower of said rolls at the same time that she was looking in another direction and was not watching either her hands or said rolls, or the covering of the roll which she was attempting to rearrange. Defendant states that said facts constitute contributory negligence on the part of the said plaintiff, Fay McRoy, and that but for said contributory negligence on the part of said plaintiff, Fay McRoy, said plaintiff could not and would not have been injured, and defendant pleads said facts in bar of plaintiff's action herein."

Of these allegations plaintiff denied in her reply only that she knew her hands would be held against the heated roller if they should be caught in the mangle or that she knew the rolls were revolving in the usual manner.

In her testimony she admitted she knew the rolls were revolving but denied that she knew her hands would be held against the heated roller if caught in the mangle.

Hence the only issue upon the trial as to her knowledge of these facts was whether she knew her hands if caught in the mangle would be held against the heated roller. But what she knew about the mangle and the danger incident to its operation bear more directly upon the question of assumed risk, also relied upon as a defense, and there is no complaint, or room for any, that that question was not properly submitted to the jury in the instruction given.

However, what she knew of the conditions under which she was working is pertinent, of course, in connection with what she did, upon the question of contributory negligence.

The only thing that she is alleged to have done which contributed to her injury is that she "attempted to rearrange the covering on the lower of said rolls at the same time that she was looking in another direction, and was not watching either her hands or said rolls or the covering of the roll which she was attempting to arrange."

This she admits in both her pleadings and her testimony, but she explains that while arranging the covering on the lower roll there was some sudden, unusual noise in another part of the room which attracted her attention and caused her thoughtlessly to look around in that direction from which it came, and that it was while her attention was thus momentarily distracted her hands were caught between the rolls, and that she could not pull them out or work the safety device because of a brick that some one other than herself had placed between the frame of the machine and the safety lever with which it was equipped. No one contradicted her in any of these statements.

The test therefore in this case of whether plaintiff was guilty of such contributory neglect as to bar her right of recovery is not alone what she knew or what she did, since there is practically no issue on these matters, but depends rather upon the legal effect of what she admittedly did when considered in the light of her knowledge, experience and age, and the conditions surrounding her at the time of the accident. And we are by no means ready to say that it was contributory negligence as a matter of law for one of plaintiff's age and experience to forget momentarily the dangerous character of her work and thoughtlessly turn her eyes aside when something unusual happened in the room, which caused her involuntarily to allow her hands to be drawn into a dangerous machine her employer put her to operate knowing the safety device with which it was equipped was out of commission, and except for which the accident could not have happened. While plaintiff also knew the brick was in the machine and that it prevented the operation of the safety lever her evidence tends to prove that she did not fully appreciate the danger resulting therefrom, since she testified that because of the padding about half an inch on the lower roll she thought she could pull her hands out without injury if they should be caught between the rolls. But even aside from

this evidence we think the question of contributory negligence was for the jury and not the court. The presumption if any is rarely ever conclusive that one of plaintiff's limited experience and immature age appreciated a danger that might be reasonably anticipated by ordinary persons as it always is against the employer, and as it usually is against an experienced person of mature years. The reason for these distinctions with reference to different persons on the same facts is obvious since the basis of the presumption against any party always is what ought he reasonably to have anticipated would happen from the given facts. To determine this question the ability and opportunity of the party to understand and appreciate what might happen is necessarily a controlling factor in every case. An employer in furnishing an instrumentality for another's use, of necessity must be presumed to have had both the ability and opportunity to understand and appreciate every danger that reasonable men thus placed would have anticipated. An employee in consenting to use the instrumentality selected and furnished by another can not have the same opportunity and often does not have the same ability to judge of the dangers incident to its use, but he too must be presumed to have anticipated such dangers as his opportunities and ability enabled him to understand and appreciate; that is, such as were reasonably apparent, not to some one else, but to him. It is for this very reason that the question of contributory negligence is usually for the jury rather than the court; and it is only a question of law and for the court when there is no room for differences of opinion among reasonable men as to whether the danger was so obvious as necessarily to have been understood and appreciated by the particular person who did the act. There are many acts which done by a youth of sixteen or seventeen years of age are obviously dangerous and so understood by him about which reasonable minds could not differ, such as if he purposely stepped in front of a moving train or put his hand on a hot stove, but what about the same things done by him thoughtlessly and involuntarily in the prosecution of some youthful sport or fancy or while attempting to perform a man's work at a complicated and dangerous machine? Is a child or a youth to be held to the same degree of accountability always and everywhere as a matured and experienced man? Certainly not, and surely we need not cite

authorities at this late date to sustain a negative answer to the query.

Neither do we regard it necessary to cite authorities to sustain our opinion that plaintiff was not guilty of contributory negligence as matter of law simply because she involuntarily permitted her hands to be drawn into a dangerous machine while her attention was momentarily distracted. To do so would not only disregard entirely the thoughtlessness of youth and measure it by the standard of maturity, but could impose upon youth all the hazards of operating a dangerous machine, made extremely so by the carelessness of the master in putting her to operate it with its safety device out of commission, which act of itself would have deprived the defendant of the defense of contributory neglect, as a matter of law under our statutes had she been two months younger than she was when the accident occurred. That the court did not err in denying defendant's motion for a directed verdict is very clear, it seems to us.

2. We are also of the opinion that the court submitted the question of contributory negligence to the jury as fully and as concretely as the facts justified or permitted. Really this is not a case where a concrete instruction could have been given very easily, since the very conception of a concrete instruction presupposes primary facts in issue, and the only fact in issue here was the ultimate fact of contributory negligence.

As we have tried to make clear that fact in this case did not depend alone or principally on what plaintiff did since she admitted doing all that was charged against her, but rather upon whether or not, under all the admitted facts and circumstances surrounding her, doing what she did, was the ultimate fact, contributory neglect? Ordinarily where the primary facts are not in issue the question is for the court, but not so here since the question for decision is the conclusion reasonable men ought to draw from relative primary facts not in issue, and this is not a question of law but one of fact, where as here there is room for diversity of opinion among reasonable men.

But even if it be conceded a more concrete instruction could have been given, those offered by the defendant were in effect but peremptories to find for it since they predicated contributory neglect upon what plaintiff admitted she knew and did, and did not make any refer-

ence whatever to her age, experience or the other circumstances upon which the question of contributory negligence depended.

These were the matters covered by the instruction on the question given by the court.

Finding no error in the record prejudicial to appellant's substantial rights, the judgment is affirmed.

Providence Mining Co. v. Hind, Receiver.

(Decided February 11, 1921.)

Appeal from Kenton Circuit
(Common Law and Equity Division).

1. Insurance—Assessments.—Insured under a policy of insurance issued by an assessment company is liable for assessments made within statutory limits to create a fund with which to pay accrued losses and expenses.
2. Insurance—Assessments.—Where insured's president acted as agent for an assessment insurance company, and later turned over the agency to employees of insured with instructions to place renewals for insurance in the company for which they were acting as agents, insured cannot refuse to pay assessments levied on the ground that it did not sign the application for the insurance, or that its employees had no authority to sign said application.
3. Insurance—Assessments.—It is no defense to a demand for assessments under a policy of insurance that insured did not know the policies were in an assessment company where insured's president and its employees acted as agents for the company.
4. Insurance—Assessments.—Where the policy expressly provides that the by-laws are made a part thereof and it is further stipulated in the policy that its acceptance constitutes one a member of the company and that by so accepting the policy insured agrees to pay, in addition to the annual premiums, such sums as may be assessed by the directors of the insurance company, insured is liable for the amounts lawfully assessed.
5. Insurance—Assessments.—Ignorance of the fact that the company in which appellant placed its policies was an assessment company held not an excuse to defeat assessments where the appellant's president, a successful business man, had acted as agent for the company. It will be presumed he knew the company was operated on the assessment basis, the contention that it was misrepresented to him he was insuring in an old line company, not finding support in the evidence.

W. H. YOST and R. C. SIMMONS for appellant.

MEYERS & HOWARD for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The Kentucky Fire Insurance Company was organized in April, 1914. It was an assessment or co-operative company, provision for its creation being found in Ky. Stats., sections 702, *et seq.* It came into existence for the purpose of meeting a situation produced by the withdrawal from Kentucky of a large number of insurance companies theretofore doing business in the state, because of some disagreement between said companies and the Insurance Department of the state. For a few months the new company did exceedingly well, at least it succeeded in placing considerably more than one million dollars of insurance on its books. The misunderstanding between the State Insurance Department and the insurance companies was of short duration and the companies soon returned. This settlement of their differences resulted in a tremendous loss of business by the Kentucky Fire Insurance Company due to cancellation. It is claimed it lost most of the better class of the business, the larger part of that remaining being undesirable and non-profitable.

The loss of business and the consequent falling off in premium receipts compelled the company to levy an assessment against its policyholders, but only a limited number responded. The company's inability to pay losses not only resulted in its being made defendant in several suits in different parts of the state, but necessitated the employment of counsel and the expense and cost incident to litigation. Nor was this all—the running expenses of the business, salaries, stationery, rents, etc., were daily accumulating. In May, 1915, application was made by two creditors for the appointment of a receiver to take charge of the affairs of the company, and W. N. Hind was so appointed.

The receiver reported that the fire losses alone amounted to \$60,000. All existing policies were cancelled. The court directed the receiver to make an assessment against the members or policyholders of \$3.00 upon each \$100.00 of insurance in force, this being the maximum liability fixed by Ky. Stats., section 709a. On this assessment the receiver collected about \$22,000. Several of the policyholders, including appellant, declined to pay. Appellant had twelve policies in the company and its part of the assessment was found by the judgment to be \$628.50, and the only policyholder against whom a

judgment was rendered in an amount to take an appeal to this court, the sums assessed others being under \$100.

A reversal is asked on three grounds which we will consider as presented.

1. That under Ky. Stats., section 702, it is necessary that insured sign a written application before it can be bound for its proportion of the loss, and as it did not sign any application for any of the policies issued to it, it is free from liability.

2. That this application must be signed by some one having the authority to bind the applicant.

We will discuss these propositions together, nor do they present any difficulties, as will be seen from a brief statement of the facts.

Desirous of getting a foothold in different sections of the state the company's secretary visited certain towns with the intention of establishing agencies. Impressed with the importance of securing as the company's representatives the best available persons, it is not surprising he should have selected Mr. W. J. Nisbet, of Providence, Ky., the president of appellant, a successful business man, the head of a corporation that in its coal operations had an output of about 200,000 tons annually, with a yearly income of from \$50,000 to \$75,000. Mr. Nisbet accepted the agency, and it was maintained in his name for about two months and until at his request it was transferred to Messrs. Hill and Meidrich, two employes of appellant company. Between April, 1914, when Nisbet assumed the agency and January, 1915, at least twelve policies for a total coverage of \$20,950.00 were issued to appellant by the insurance company and upon which insured paid more than \$400.00 in premiums.

The application for the first policy so issued was endorsed in the name of Nisbet as agent, the others bear the agency name of Hill and Meidrich. Appellant's name appears on most of the applications signed by "C. J. M. (Meidrich)."

Mail pertaining to the insurance business addressed to Nisbet was turned over by him to Hill and Meidrich; they actually wrote the policies and collected the premiums. Nisbet authorized Hill and Meidrich to use his name as agent until the transfer of the agency could be effected. He entrusted Meidrich and others with the placing of the company's insurance and says he never read any of the policies.

Meidrich, introduced by appellant, and now its secretary testifies to the same effect, and when asked to state what instructions Nisbet gave him in regard to the insurance, says:

"He told me, as your policies expire to renew them in the Kentucky Fire Insurance Company, and deposit these policies in the vault and we could collect the premiums on them."

Notwithstanding the strong probative effect of this evidence, appellant insists that Hill and Meidrich had no authority to bind it since Nisbet never authorized them to place any insurance in an assessment company, his instructions being to put it in an old line company. Though Hill and Meidrich were charged with placing the renewals and were told by Nisbet to insure in the Kentucky Company, both Nisbet and Meidrich state that the first knowledge they had the latter was an assessment company was when they received notice that the company was in financial straits. Not until then did they examine the policies and discover, as they could have done at any time, that the Kentucky Company was an assessment corporation, as the by-laws, printed in full in the policies, are expressly made a part of the insurance contract.

In article ten of the by-laws provision is made for an assessment of the members or policyholders in the event the reserve fund becomes exhausted.

It is difficult to understand how Nisbet and Meidrich, careful and prudent business men as they appear to be, could have been ignorant of the fact that the Kentucky Company was organized upon an assessment basis. Both had acted as its agent, they handled a number of its policies, paid the premiums, and evidently considered the mining company as covered to the extent of the insurance in force. Farrar, the insurance company's secretary, said Nisbet told him he was seriously troubled as to his properties at Providence, because of his inability to secure proper protection against loss by fire. This was at the time most of the old line companies had withdrawn from the state and Nisbet must have been cognizant of this fact as evidenced by his statement to Farrar.

The lower court was of the opinion the statute (sec. 702) did not require that the company write policies only upon written application signed by the applicant. The portion of the statute referred to reads:

"Every person insured in such corporation, who shall sign an application for insurance, as required by the certificate of incorporation, or the by-laws of the corporation, shall thereby become a member thereof."

In *Bracken County Ins. Co. v. Murray*, 166 Ky. 821, 179 S. W. 842, this court held that to constitute one a member of a co-operative or assessment company under Ky. Stats., section 702, he must not only apply for a policy, but the policy must be issued to him. A member and a policyholder were treated as one and the same and at once became an insurer as well as the insured.

We do not find it necessary to pass upon the necessity of a signed application in the instant case. While aware of the rule that an agent with limited authority can not bind his principal with matters outside the scope of his authority, we are satisfied Hill and Meidrich were given direct and positive authority, indeed direction by appellant's president, to place insurance in the Kentucky Company. These agents and employes of both the insurer and insured issued the policies, not only with the knowledge but under instructions of Nisbet to place the renewals in the Kentucky Company.

Then, too, in the printed stipulations and conditions made a part of the policy it is provided:

"The insured heretofore named, by accepting this policy, thereby becomes a member of this company and agrees to pay it the premiums annually during the life of this policy, and in addition thereto such sum or sums . . . as the directors of said company shall assess"

The statute was intended as a protection to the company; membership could not be forced upon it and more than the mere application was necessary.

But upon the issuance of the policy by the company and its acceptance, insured would thereby become a member of the company subject to its by-laws and bound by the provisions and conditions of the policy. Such is the case here. For the policies issued and delivered to appellant there were applications signed by its duly authorized agents, and fraud aside, the insured is liable for the assessment ordered by the court.

3. It is contended the policies were obtained through misunderstanding and misrepresentation. This contention has two angles. (a) Nisbet testifies that Farrar told him the Kentucky Company was an old line stock

company and he wanted him to take some stock in the company, and the first he knew it was an assessment company was when he received the notice of the assessment. He files a letter written to him by Farrar in March, 1915, which he claims is confirmatory of this fact. The letter refers to a conversation with Nisbet the preceding summer when they were talking over investing in insurance stock. The letter, however, expressly refers to the Colonial Fire Insurance Company, a stock company whose organization was contemplated with the end in view of taking over or reinsuring the risks on the books of the Kentucky Company. Farrar says this is the company to which he made reference in his conference with Nisbet. We are inclined to accept this version of the conversation. In the first place there could have been no stock in the Kentucky Company. In the second it is inconceivable that such capable and successful business men as Nisbet and Meidrich could have been so ignorant of the character of the Kentucky Company for two reasons:

(1) They both acted as agents for the company and it is not probable they would have assumed this relationship and continued therein for a period of several months without discovering they were representing an assessment company, and (2) due consideration for the interest and welfare of their principal, the exercise of ordinary business acumen or even slight care would have caused them to make at least a casual examination of the policies.

(b) Nisbet says he told Hill and Meidrich to place the renewals in an old line company and he did not authorize them to insure in an assessment company. From this it is argued that the placement of the insurance in the Kentucky Company, contrary to Nisbet's instruction, relieves appellant from all liability growing out of the insurance contracts. Counsel overlook the uncontradicted statement of Meidrich that Nisbet told him as the policies expired to place the renewals in the Kentucky Company. Nor can any special significance be attached to the fact that the policies as written were placed in the vault and were never seen or examined by Nisbet until after he received the notice of assessment. This is merely confirmatory of the agency and authority of Hill and Meidrich to take care of the renewals, pay the premiums

and put the policies in the vault as Meidrich testifies Nisbet instructed him.

We find nothing in the record justifying a reversal, hence the judgment is affirmed.

Great Northern Refining Company v. Lutes, et al.

(Decided February 11, 1921.)

Appeal from Lee Circuit Court.

1. Nuisance—Storing and Piping Oil.—The storage in tanks of crude petroleum and the piping of same into tank cars for shipment by rail is not per se a nuisance, but the manner in which the business is conducted, its proximity to other buildings and the circumstances surrounding it, may be such as to render the same a nuisance.
2. Nuisance—Noisome Odors.—A nuisance may be created where the air is so corrupted by noisome smells as to substantially interfere with the use and occupancy of one's premises for residential purposes.
3. Nuisance—Conduct of Business—Question for Jury.—Whether the conduct of a business is such as to create a nuisance is usually under the facts of the case one for the jury and not the court, the question being one not of negligence or no negligence but nuisance or no nuisance.
4. Nuisance—Evidence—Introduction of Deed.—Where an issue was raised by the pleadings as to who was the owner of or operating a business alleged to create a nuisance it was error to overrule a motion to introduce in evidence a deed executed before the creation of the condition complained of whereby defendant conveyed the property involved to another who thereafter operated the plant.
5. Nuisance—Anticipatory Loss by Fire.—The mere anticipatory loss by fire because of the possibility that an oil tank might be struck by lightning or fired by a spark from a locomotive does not form the basis upon which a legal recovery might be predicated under the facts presented in the instant record.

HURST, ROSE & STAMPER for appellant.

THEO. B. BLAKEY and HOBSON & HOBSON for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

This is an appeal from a judgment for \$800.00, awarded appellees as damages growing out of the erection and

maintenance of an oil tank and a loading rack within approximately one hundred feet of their residence.

The petition alleges appellant had erected said tank and loading rack and was constantly piping crude petroleum oil into the tank, which had a capacity of 1500 barrels, and from the tank to the cars for shipment by rail, and that the fumes from said oil and the gases escaping therefrom were so disagreeable, offensive and injurious as to constitute a nuisance and so as to make their residence almost uninhabitable.

It was also alleged that because of the proximity of the tank to their residence, and the fact that the oil was impregnated with gas and was highly inflammable they were constantly in danger of having their property destroyed by fire.

We deem it sufficient to refer to but few of the several points urged for reversal.

The petition is not demurrable. The storage of oil upon one's premises is not *per se* a nuisance. A lawful business can not be a nuisance *per se*, but the character of the business, the manner in which it is conducted, its proximity to other buildings and the surrounding circumstances may be such as to create a nuisance. It is not every annoyance that will give a right of action to the complaining party. A nuisance is that which offends the olfactories of an ordinary man and not those of an individual with sensitive and delicate nostrils. It is usually for the jury to say what amount of annoyance will constitute a nuisance such as will give a cause of action to the person annoyed.

Every one who brings or stores oil on his land must confine it securely in pipes, tanks or reservoirs, or at least not permit it to escape on to the land of another, whether by flowing over the surface or percolating through the soil, and if he do not, even though guilty of no negligence, he will be liable for whatever damage is suffered by the oil escaping. This is true although the refining of oil is a perfectly legitimate business. Nor is the owner of property injured by the operation of oil wells or works confined to instances where the oil actually enters upon his premises, as he may recover because of noxious odors occasioned by their operation rendering his premises unhealthy or objectionable to live upon. See Thornton on Oil and Gas, sections 661, 664, 666.

Appellees' property is located in the city of Beattyville and it is alleged that due to a break in a pipe or leakage from the tank, oil flowed upon their premises. This could hardly be true as we understand the record, as their property is much higher than the public way which separates it from the slate pile upon which the tank is erected, but it probably could have flowed against their property.

As said in *Joyce on Nuisances*, section 157, where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another's property, such smells constitute a nuisance. The question is not one of negligence or no negligence but of nuisance or no nuisance.

A gas company has been held responsible for the ordinary smells that usually proceed from such works if they constitute a nuisance, and the fact that it is not negligent will not protect it from liability if even in its usual course of business it injure others. *Thornton on Oil and Gas*, section 666, and cases cited.

A nuisance might be created by crude petroleum escaping from storage tanks. Such being the question raised by the petition, we think it stated a cause of action.

The denials of the answer put in issue the affirmative matter of the petition, one of the main defenses being that appellant was not the owner of nor was it in charge of the operation or maintenance of the oil tank and loading rack.

During the introduction of testimony appellant offered in evidence a deed dated January 11, 1919, from it to the Lee Marketing Company, by the terms of which appellant conveyed to its grantee its pipe line in Lee county to the town of Beattyville, as well as its property in the town of Beattyville, consisting of all pumps, pump station, gathering lines, machinery, fixtures and equipment of every sort connected therewith. Upon objection the court declined to permit this deed to be introduced. This was error. The trial court appears to have made this ruling because the deed did not specifically point out nor mention that the tank and loading rack were included in the description of the property conveyed. This, in the nature of things, could not have been done since, at the time the deed was executed and recorded, neither the tank nor the loading rack had been erected;

but it is not disputed that the land upon which they were later constructed was included in the deed.

It is in evidence that on one of the tanks appellant's name appears, from which it is argued that as a matter of fact defendant not only owned but was conducting the business causing the nuisance complained of. Appellant offered, as an explanation for the presence of its name on the tank, that it had merely contracted to take the oil, though the tank and other equipment belonged to the Lee Marketing Company to whom it had conveyed its property and which latter company was conducting the business. At any rate the question was, under the evidence, for the jury. The court should have permitted the deed to be read in evidence.

The court, among other things, instructed the jury that among the elements of damage they should consider the danger of fire to appellees' residence caused by the presence of the tank and loading rack. We do not think under the circumstances presented by the present record that this was a matter to be submitted to the jury. It was too problematical; ordinarily the mere anticipatory loss of fire because of the possibility that the tank might be struck by lightning or fired by a spark from a locomotive does not form a basis upon which a legal recovery might be predicated. It might never happen; if it did, and the owner was negligent, in a proper suit that question could be dealt with. The rule is thus stated by Joyce on Nuisances, section 388:

"It is held that the nearby location in relation to a dwelling house of coal oil, and gasoline tanks is not of itself a nuisance carrying liability, even though such tanks are also near to steam railroads, there being no showing of negligence in construction or want of care to prevent ignition from sparks from locomotives and no just grounds of apprehension, as claimed, from fire and consequent injury; and the fact that the rental and salable value of the property has been decreased is held insufficient."

While the case would not be reversed on this ground alone, since in so instructing the jury the court followed in almost exact phraseology an instruction tendered by appellant, upon retrial the court will so modify the instruction given as to eliminate the objectionable feature referred to.

For the reasons given judgment will be reversed for further proceedings not inconsistent herewith,

Watkins v. Pinkston.

(Decided February 11, 1921.)

Appeal from Daviess Circuit Court.

1. Injunction—Opinion by One Judge Not Law of Case on Subsequent Appeal—Estoppel.—An opinion of a member of this court ordering or dissolving a temporary injunction, pursuant to the provisions of section 296 of the Civil Code, although concurred in by a majority of the court and the opinion ordered published, does not become the law of the case in a subsequent appeal on the merits after final trial below, and is therefore not binding as an estoppel upon the parties nor upon this court under the "law of the case" rule.
2. Officers—Term of Police Judge.—That portion of sub-section 5 of section 3480b, Kentucky Statutes, 1915 edition, which limits the term of police judge to two years when elected in the odd year after the adoption by cities of the third class of the commission form of government, violates the provisions of sections 160 and 167 of the Constitution and is therefore void. Those sections fix the term of police judges at four years, and it is incompetent for the legislature to change the term either by shortening or lengthening it.

LAWRENCE P. TANNER and W. T. ELLIS for appellant.

W. P. SANDIDGE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The questions involved on this appeal were considered by a member of this court upon a motion for a temporary injunction (which had been denied by the judge of the circuit court) made pursuant to provisions of section 296 of the Civil Code of Practice. That motion was considered and determined by four of the members of this court and the opinion sustaining it and directing that the temporary injunction issue is reported in 186 Ky., 365, wherein the facts as well as the legal questions involved are set out in detail and we do not deem it necessary to repeat them here. That opinion, however, will not be treated on this appeal from a judgment upon the merits as the "law of the case," and binding upon the parties. *Campbell v. Mim*, 149 Ky. 101, and *Fish v. South*, 185 Ky. 663. The injunction opinion, however, when it is concurred in by a majority of the members of this court may be looked to for its persuasive effect. A subsequent appeal upon the merits is, then, in the nature, and has the effect of a petition for a rehearing in the con-

sideration of which the first (injunction) opinion is, of course not binding.

We have again thoroughly considered the questions determined upon the motion for a temporary injunction and see no reasons why we should recede from any of them as expressed in the opinion referred to. Indeed, the argument for appellant on this appeal is the same as that made in the injunction proceeding, with only one additional authority referred to, which is the case of *State, ex rel. Harrison v. Menaugh*, 151 Ind. 260, 43 L. R. A. 408. The questions presented and determined in that case are so radically different from the ones here involved that it will require only a brief reference to them to demonstrate the fact. The legislative act there involved was one extending the time for the election of township trustees and township assessors from the first Tuesday after the first Monday in November, 1898, to the same day in November, 1900. The officers affected were elected pursuant to a statute then in force on the same day in November, 1894, for a term of four years, and the effect of the statute involved was to extend the term of the incumbents for a period of two years, making their actual service under their election in 1894, a period of six years instead of four years, and it was claimed that such a result violated section 2 of article 15 of the constitution of the state, saying: "When the duration of any office is not provided for by this constitution, it may be declared by law. . . . But the general assembly shall not create any office the tenure of which shall be longer than four years." The offices of township trustees and township assessors, concerning which the statute involved related, were not constitutional offices. There was no provision in the fundamental law of the state creating them and, of course, there was no time fixed when they should be elected; but under other provisions of that document it was competent for the legislature to create them and to provide the tenure of the office, but limited, as we have seen, to a maximum term of four years. However, section 3 of article 15 of the Indiana constitution prescribed that, "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term *and until his successor shall have been elected and qualified.*" The supreme

court of the state, upholding the act involved, held that, since the offices to which the act related were purely legislative ones, in the absence of a constitutional provision fixing the terms, or the time when they should be filled by election, it was competent for the legislature, not only to create them, but to prescribe from time to time, within its discretion, when the incumbents should be elected; and that if a subsequent amendatory act, relating to the time of the election, should postpone that event to a time more than four years from the last preceding election, the intervening time could be filled by the incumbents continuing to serve under the provisions of section 3 of article 15 of the constitution of the state, which we have above set out. In other words, it was held that the quoted portion of the constitution of that state prescribed the maximum tenure of legislatively created officers at four years, but that such maximum tenure "shall be construed to mean that such officer shall hold his office for such term (four years) *and until* his successor shall have been elected and qualified." The court held that the officers involved were elected for the prescribed term of four years, and could serve the additional period following that term until their successors were elected and qualified (as provided in the act then under consideration) which brought them squarely under section 3 of article 15 of the state's constitution, and the act was accordingly upheld.

We have nothing in this case remotely resembling the questions there presented. Our constitution, as pointed out in the injunction opinion, expressly recognizes the office of police judge (involved here) of cities and towns; and section 160 of that instrument expressly prescribes the terms of the office, which is four years, and section 167 expressly prescribes the time for the first election of such officers after the adoption of the constitution and then says that subsequent elections shall occur "thereafter as their terms of office (every four years) may expire." Other provisions of the section, prescribing the time when the terms of police judges who are first elected under the constitution shall commence, are not involved in this case. We are still firmly of the opinion that so much of subsection 5 of section 3480b, Carroll's 1915 edition of the statutes, as attempted to limit the term of appellee Pinkston (to which he was elected in 1917) to two years, is unconstitutional as violative of the provisions of sections 160 and 167 of our constitution. The trial court sustained a demurrer to defendant's answer

relying on subsection 5 *supra* of the statutes, and held it to be unconstitutional, as was declared in the injunction opinion, and defendant declining to plead further the relief prayed for in the petition was granted. We have no doubt of the correctness of the court's ruling and the judgment is accordingly affirmed.

James v. Commonwealth, for Use, etc.

(Decided February 11, 1921.)

Appeal from Carter Circuit Court.

1. **Criminal Law—Continuance—Affidavits.**—The court's refusal to grant a continuance because of absent witnesses (where the affidavit incorporating the testimony of such witnesses is read to the jury) will not be disturbed on appeal, unless from all of the facts and circumstances appearing in the record there was a manifest abuse of discretion by the court in refusing the continuance, by reason of which the party applying did not obtain a fair and just trial.
2. **Bastards—Proceedings Under Bastardy Laws.**—In bastardy proceedings instituted under our statute (sections 167-180 inclusive) it is competent to allow testimony showing the situation in life of the parties, which includes their financial standing, as well as their obligations because of dependents, all for the purpose of showing defendant's ability to pay the amount which should be fixed for the support and nurture of the child.
3. **Bastards—Proceedings Under Bastardy Laws.**—Whether it is competent to make proof of the child before the jury in the trial of such proceedings is not determined, since the record is not in condition to present the question; but it is held that it is not error for the child to be present in the court house with its mother during the trial in the absence of any effort to call the jury's attention to it for the purpose of showing resemblance to the defendant on trial.
4. **Bastards—Setting Aside Verdict.**—Verdicts in bastardy proceedings, like those in other civil cases, to which class it belongs, will not be set aside unless palpably and flagrantly against the evidence.

WAUGH & VINSON for appellant.

THOMAS S. YATES for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

On June 8, 1918, the appellant and defendant below, Bert James, was arrested upon a warrant issued by the

county court of Carter county in an affiliation proceeding (usually called bastardy proceeding) and which is provided by sections 167-180, inclusive, Kentucky Statutes. The proceedings were instituted by Sophia Pennington, an unmarried woman, who charged defendant and appellant with being the father of her illegitimate child, which was born on February 14, 1918. A verdict in the county court found defendant guilty and required him to pay for the support of the child the sum of \$50.00 per year for eleven years, aggregating the sum of \$550.00. Defendant prosecuted an appeal from the judgment rendered on that verdict to the circuit court of the county, and a trial had therein on May 28, 1919, resulted in another verdict of guilty and an assessment against him of a total sum of \$750.00, payable in installments of \$50.00 per year for fifteen years, and from the judgment pronounced on that verdict this appeal is prosecuted.

A number of alleged errors are incorporated in the motion and grounds for a new trial, but all of them except three are abandoned and only those three are urged before us. They are: (1) error of the court in refusing to grant defendant a continuance upon his application therefor supported by his affidavit; (2) incompetent evidence which the court permitted the Commonwealth to introduce over defendant's objection, and (3) that the verdict is not sustained by sufficient evidence.

The appeal to the circuit court from the judgment in the county court was taken March 26, 1919, but the case had been pending in the county court at that time for more than eight months, since, as we have seen, the defendant was arrested on June 8, 1918. On the 23rd day of May, 1918, being the day the case was set for trial, defendant filed his affidavit showing the absence of certain named witnesses and what their testimony would be and entered motion for a general continuance of the case. The court overruled the motion and set the trial forward six days, at which time some of the witnesses included in the affidavit were present, but others were still absent. The motion for a continuance was renewed at that time but the court overruled it and permitted the defendant to read his affidavit incorporating the material testimony of the absent witnesses. Two of those witnesses, according to the affidavit, would testify if present that they had been criminally intimate with Sophia Pennington at a time when they could have been the father of her infant child. One absent witness, Will Stephens, (and

who it is strenuously argued is the real putative father), is made to say in the affidavit for a continuance that the child's mother after it was begotten stated to him that he was its father. This, of course, is only in the nature of a contradictory admission made by the mother, and Stephens was shown to have been all the while after the institution of the proceedings enlisted in the army and no effort was ever made to take his deposition, although the proceedings had been pending for nearly a year before the trial. There were two other witnesses who testified at the trial to having had intercourse with Sophia Pennington and we are unable to see under all the circumstances in the case wherein the court abused its discretion, under the rules of practice prevailing in this Commonwealth, in declining to continue the case, and permitting defendant to read his affidavit as the depositions of the absent witnesses. It might be stated at this point that he may in reality have profited by the court's ruling, since some of the witnesses for whose absence he made the first motion for continuance were present at the trial and testified exactly opposite to what he claimed in his affidavit they would do. In cases of this kind a reversal will not be ordered unless it appears from the record that the action of the trial court in refusing the continuance was a manifest abuse of discretion, and clearly prejudiced the substantial rights of the complaining litigant, and prevented him from obtaining at the trial substantial justice. We can detect no difference between the consequences, in the matter complained of, in the court's ruling in this case, and similar rulings in many other cases which this court has uniformly upheld.

Under ground (2), argued and relied on for a reversal, it is insisted (a), that the court erred in permitting the introduction of testimony showing the amount of property owned and possessed by the mother of the child and by the defendant, and (b), that profert of a child before the jury for the purpose of establishing a resemblance between it and the defendant as its alleged putative father was incompetent and constituted a reversible error. Considering these subdivisions of the ground under consideration in the order mentioned, it is doubtful if defendant is in condition to insist upon them, since his counsel first made inquiry touching the objections made in each of the subdivisions; but, waiving this point, we are thoroughly convinced that the complaint made in subdivision (a) was not error. Proceedings of this kind

are generally held to be civil in their nature and not criminal. Cases from this court so holding are, *Chandler v. Commonwealth*, 4 Met. 66, and *Francis v. Commonwealth*, 3 Bush. 4. Their chief purpose is to place the burden of rearing, caring for, and educating the unfortunate infant upon the shoulders of him who is responsible for its existence. If the defendant is in reality the father of the child, for whose benefit the proceedings are provided, the latter is entitled to have its father contribute such a sum as is commensurate with his ability to pay. The state is interested in having its inhabitants reared and educated in such manner as to develop the best citizenship. This duty is primarily imposed upon the parents of children and if the mother of a bastard child, on account of her poverty, is unable to discharge that duty, the greater reason exists why the father should contribute a sum commensurate with his ability to pay for the purpose of discharging it. Hence, it is said in 3 R. C. L., 767, "The amount allowable for the maintenance of a bastard child is largely discretionary, depending upon the situation in life of the parties." The situation of the parties necessarily includes their *financial* situation, and we are convinced that the court committed no error in admitting the testimony complained of. Of course, it is allowable in such cases (as was permitted in this one) to show other financial burdens of the defendant, in the way of dependents, which the jury may consider in measuring his ability to pay the sum found by their verdict.

The complaint made in subdivision (b), of the ground now under consideration, has not heretofore been determined by this court, and the courts of other jurisdictions are not in harmony upon the question. 3 R. C. L., pages 764-766; 5 Cyc. 663; 7 Corpus Juris 993; notes to case of *State ex rel, Scott v. Harvey*, 52 L. R. A. 502; *Flores v. State*, 1917B L. R. A. 1148, and *Frierson v. Commonwealth*, 175 Ky. 684. From an examination of the authorities cited it will be found that, perhaps numerically speaking, the greater number of courts hold that it is competent to make profert of the child upon the trial of this character of proceedings for the purpose of establishing its paternity, but it will also be found that, for various reasons, other courts hold that such profert is prejudicial and incompetent. But, even those of the latter class, as will furthermore be seen, say that it is not incom-

petent for the child to be present in the court house during the trial, and that profert of it may be made to show that its father is of a different race than the one to which the child belongs. But, whatever may be the true doctrine upon this subject, we do not feel called upon, under the condition of this record, to commit ourselves either the one way or the other upon the questions of practice involved, since we find from the record that the only act occurring at the trial, remotely resembling a profert of the child (who was present throughout the trial without objection) was a statement by the county attorney made while cross-examining a witness for defendant who testified in chief that he had been criminally intimate with the mother, and had an opportunity to be the father of her child. The county attorney then called the attention of the witness to the child and said, "So you think this is your kid, do you?" Defendant immediately objected and the court sustained the objection and the witness was not permitted to answer. So, we have a case where no effort was made to make profert of the child for the purpose of establishing resemblance between it and the defendant on trial, and if what was done by the county attorney could be said to constitute a profert of the child for the purpose of showing resemblance or non-resemblance between it and the witness on the stand, the court excluded it. We therefore think that this ground, so earnestly relied on, is not presented by the record and we are unwilling for the first time to commit ourselves upon a disputed legal proposition when to do so would make our commitment possess at least the coloring of dictum. We prefer that before we should assume a permanent position upon a disputed proposition of law, not heretofore passed on by us, we should have a case squarely presenting the question.

Upon ground (3) relied on, but little need be said. The mother of the child testified positively that defendant was its father. He admitted illicit relations with her but claimed that they began and occurred in September before the child was born the following February, which was too late for him to be its father. He furthermore testified that he was not acquainted and did not begin associations with the mother of the child until about the first of September preceding its birth, but in this he is contradicted by a number of witnesses who were neighbors of the mother and who testified that he was constantly visiting her about the time the child, in due course

of nature, was begotten. The credibility of the witnesses testifying in this kind of proceeding is, as in other cases, to be determined by the jury trying the case. If they in this case believed the mother and other witnesses, and some circumstances appearing in the case, no other verdict than the one returned could have been made; while if they had believed the defendant and his witnesses no doubt the verdict would have been in his favor. Whether we regard this as a civil or criminal proceeding, we are not authorized to reverse the judgment and grant a new trial, unless the verdict is palpably and flagrantly against the evidence. We do not find it so, and are therefore constrained to affirm the judgment, which is accordingly done.

Gastineau v. McCoy.

(Decided February 11, 1921.)

Appeal from Pulaski Circuit Court.

1. Libel and Slander—How Words Construed—Innuendo.—Words in a slanderous charge are to be construed according to their ordinary meaning, but such meaning may not be enlarged by innuendo, so as to give to the words an application and scope which their ordinary sense does not import; but this does not prevent the plaintiff averring extrinsic facts connecting the slanderous words with the facts as they existed, so as to show the intention of the defendant in speaking the words and the sense in which they were understood by those who heard them, provided it is not the purpose of such extrinsically alleged facts to attach a meaning to the words different from what they ordinarily import.
2. Libel and Slander—How Words Construed.—In the construction of statutes the purpose of the legislature in enacting them should be looked to and considered and the literal meaning of words will not be strictly adhered to when to do so would defeat the intent and purpose of the legislature.
3. Libel and Slander—When Words Sufficiently Accuse.—When oral slanderous words aided by extrinsic facts are sufficient to impute the charge of removing a stump of a tree, which was a corner of a survey of land, they sufficiently accuse plaintiff of the offense denounced by section 1228 of the Kentucky Statutes and will support a cause of action for slander.

J. W. COLYAR and W. M. CATRON for appellant.

VIRGIL P. SMITH and M. L. JARVIS for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

This is a slander suit brought by appellant and plaintiff below, G. W. Gastineau, against the appellee and defendant below, A. W. McCoy. The petition avers that defendant on four separate occasions in the presence and hearing of named persons, falsely and maliciously spoke of and concerning plaintiff certain slanderous and defamatory words imputing to him the commission of a felony. On one occasion plaintiff is alleged to have said that: "Here was the corner old man Gastineau and Ben Howard dug it up, now claims the corner down there so as to move it over on me about two rods;" on another that: "Old man Gastineau and Ben Howard dug up the corner to move down on me that much;" on another that: "Here is where Neal showed me the corner but Gastineau and Ben Howard dug it up and moved it down there," and on the fourth one, that: "Gastineau and Ben Howard moved the corner by destroying the former, and placing the one in its place, about two rods south so the line would lap over on me." The answer traversed the allegations of the petition and upon trial the court at the close of plaintiff's testimony sustained defendant's motion for a directed verdict in his favor, which was returned by the jury, followed by a judgment dismissing the petition, to reverse which plaintiff appeals.

At common law there were only five classes of cases in which oral slanderous words were actionable *per se*, but these to some extent have been added to by statutes. A notable instance with us, is section 1 of our statutes, making false accusations against a woman concerning her chastity actionable *per se* which was not so at common law. *Martin v. White*, 188 Ky. 153. It is unnecessary for us here to refer to or set out the various classes of defamatory words which are actionable *per se*, it being sufficient to say that a false and malicious accusation imputing to one the commission of a felony is everywhere admitted as affording the accused person a cause of action against the one uttering them without alleging or proving special damages. It is apparent that if plaintiff in the instant case has a cause of action at all, it is because the words alleged to have been uttered by defendant impute to him the commission of a felony, since they do not come within any of the other imputations which would make them actionable *per se*.

Section 1228 of the present Kentucky statutes says: "If any person shall fraudulently and willfully remove, deface, cut down, or destroy a corner tree or corner stone of the boundary of this state, or to the survey of any tract of land, he shall be confined in the penitentiary not less than one nor more than five years." Unless, therefore, the words relied on, in the light of the circumstances and under the conditions which they were spoken, were sufficient in law to convey to those who heard them the impression that defendant in using them intended to charge plaintiff with the commission of the crime denounced by the statute, the plaintiff failed, both in his pleading and proof to sustain his cause of action, and the judgment dismissing the petition should be affirmed; otherwise it should be reversed.

We are not informed as to the grounds upon which the court sustained the peremptory instruction in favor of defendant, but enough appears in the record to convince us that the court concluded that the words, standing alone, were insufficient to charge the crime denounced by the section of the statute *supra*, or, that the inducement, allegations and the colloquium averments contained in the petition, supplied the failure of the words themselves to charge the crime and remove the obscurity contained in them, so as to make the petition as a whole state a legal cause of action, but further concluded that plaintiff's testimony failed to establish his cause of action as alleged in his petition.

At common law the pleading of a plaintiff in a slander suit contained, when necessary, what was known as an "inducement," "a colloquium" and an "innuendo." The peculiar office of these separate divisions of the pleading was distinctly circumscribed, but in more modern times when the technical rules of common law pleading have been superseded by the enactment of codes of practice, the extreme common law technical rules with respect to pleadings in libel and slander cases have been largely modified, so that now if a pleading contains the necessary allegations, whether they be found in that part of it more appropriately styled the "inducement," the "colloquium" or the "innuendo," it will be sufficient although not contained in that particular division where the rules of the common law required it to be. If, therefore, the petition in this case, in any part of it, avers facts in aid of the uttered words so as to make them impute to plaintiff the commission of the offense denounced by the stat-

ute, it will be upheld as sufficient, and if the proof tended to establish those allegations the case should have gone to the jury.

In actions for libel and slander it is not essential to sustain plaintiff's cause of action that the defamatory words should be couched in the same technical language as is required to be stated in an indictment preferring the charge imputed. As said in the Martin case, *supra*, "as in other cases (than want of chastity) it is not necessary that the charge be made in direct, specific language so as to show affirmatively and beyond doubt what the speaker meant, but it is sufficient if the entire words employed in their natural and ordinary meaning were calculated to impress the hearers with the belief that the speaker intended to charge the particular slander involved and that they so understood him." As an outgrowth of this rule it is permissible for a pleading to allege extrinsic facts showing the circumstances and conditions under which the words charged were spoken, so as to connect them with such extrinsic facts, and to show that it was the intention of the speaker to prefer against plaintiff the particular charge, and that the hearers so understood the words. Thus, to charge a person with having "sworn a lie" is not *per se* slanderous, but when it is alleged that they were spoken with reference to a proceeding in which the plaintiff testified and was sworn, they become slanderous *per se*. *Watson v. Hampton*, 2 Bibb 319; *Martin v. Melton*, 4 Bibb 99; *Beswick v. Chappell*, 8 B. Mon. 486; 17 R. C. L. 393, and the Martin case, *supra*. This does not violate the universally accepted rule that an innuendo can not enlarge the ordinary meaning of the words so as to give them a meaning and an application contrary to that which they reasonably and ordinarily import. The rule stated above, permitting allegations and proof of extrinsic facts, does not enlarge the ordinary import of the words, but connects them with the facts of the particular case, in order to show what the speaker meant in uttering them, and to show the sense in which they were understood by those who heard them; provided the sense given them, as thus explained and applied, is not inconsistent with the meaning of the words themselves. Thus in R. C. L., *supra*, it is said: "The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction, and render it actionable, where, standing alone and not thus explained, the language

would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and *per se* refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege, by way of inducement, the existence of such extraneous matter." These principles are fundamental and we deem it unnecessary to prolong this opinion by further discussion or reference to precedents.

In plaintiff's petition he alleged that the words complained of were uttered with reference to a corner of a survey of land, which corner was marked and designated by a tree or stump, and which fact was known to defendant and to those who heard his words and that he spoke them with reference to the removing of such marked corner, and that he thereby intended to charge and did charge plaintiff with removing the stump which marked the corner. His proof fully sustained his allegations, and if the removing of the stump of what was formerly a "corner tree" is sufficient to create the offense denounced by the statute, *supra*, the peremptory instruction was improperly given. Literally speaking, the statute does not denounce the act of cutting down or destroying a corner *stump* to a survey of a tract of land, and it is therefore earnestly insisted that plaintiff's cause of action is neither sustained by his allegation nor his proof, since to constitute the felony denounced by the statute the object removed must be either a "corner tree" or a "corner stone." But we can not accept this literal and narrow interpretation of the statute. The rule for the construction of statutes is that they should be given that interpretation which will carry out the intention and purpose of the legislature in enacting them. The gravamen of the offense denounced by the statute is the fraudulent and willful removing of a natural, fixed and selected object to designate the corner of a survey of a tract of land, and the purpose of the legislature in enacting it was evidently to punish any one for removing such designated corner in the manner stated therein and thereby to perpetrate a fraud on another to his own advantage. We think the language of the statute, viewed in the light of the purpose of its enactment, is sufficiently broad to include the fraudulent or willful removing of the stump

of a once "corner tree." We are not called upon to hold in this case that the statute would include the removal of an artificial stake driven in the ground, or any artificial marking object other than a stone (which is expressly mentioned) since the stump of a tree is a part of it and when removed leaves nothing remaining of the original natural mark. If the corner tree had been partially blown down leaving nothing but a snag, thus partially destroying it, could it be said that a fraudulent and willful removing of the snag would not constitute the offense? We think not, and by the same line of reasoning we conclude that to remove the stump in the same manner would likewise constitute the offense.

There is nothing in the Beswick case, *supra*, relied on by appellee, in conflict with the conclusions we have reached. On the contrary a reading of the opinion will show that it sustains our views. There the words charged were: "You removed the corner tree." There was no allegation in the petition to show that the words were used with reference "to the corner tree of a survey of land" and it was held that the words, standing alone unaided by allegation, did not impute to plaintiff the statutory offense. The opinion says, "That they (the words) were so used, must be shown by a distinct averment," etc., which averment was not contained in the petition in that case. It is in this *vital particular* that the instant case differs from that one.

We therefore conclude that the court erred in directing a verdict for defendant, and the judgment is reversed with directions to set it aside, to grant plaintiff a new trial and for further proceedings consistent with this opinion.

Darnell's Ex'rs, et al. v. Darnell, et al.

(Decided January 18, 1921.)

Appeal from Bath Circuit Court.

Wills—Construction.—Under a will by which testator directed that the residue of his property be divided equally between his brothers and sisters, naming them, "and the nieces and nephews of my brothers and sisters who are living at the date of my death, and my sister-in-law whose husbands are dead, viz., Dulcina Darnell and Lina Darnell, and Mary Jones, my deceased wife's sis-

ter, who resides in Urbana, Illinois, and Oddie L. Power, my great-niece, all of whom mentioned are to share equally alike," held that the words, "nieces and nephews of my brothers and sisters who are living at the date of my death," include the children not only of the testator's deceased brothers and sister, but of his living brothers and sisters, and therefore all the testator's nieces and nephews.

C. W. GOODPASTER, ED. C. O'REAR and J. C. JONES for appellants.

W. B. WHITE for appellees.

OPINION OF THE COURT BY JUDGE CLAY—Reversing.

This appeal involves the construction of the will of Thomas L. Darnell, a widower, who died childless and a resident of Bath county in the year 1919. Omitting the introductory and attestation clauses, the will is as follows:

"1st. I will and devise that all of my just debts, funeral expenses and costs of administration first be paid.

"2nd. I will and devise to my eldest sister, Ruth Jones, and to my niece, Mary Jane Power, and to my great-niece, Oddie L. Power, the house and lot in which I now live, situated in the town of Owingsville, Bath county, Kentucky, to have and to hold during their natural life, and as each one shall die to pass unto the surviving one and when each of them shall have died to pass then to my brothers and sisters who are living, and if none of them are living at their said death, then it is my desire that it shall pass to my nieces and nephews who are living and to be equally divided between them.

"3rd. I also give and devise to Ruth Jones, Mary Jane Power and Oddie L. Power all of my household effects of every description consisting of silver plate, statuary, books, china ware, glass ware, pictures and paintings, beds, and bedding, in fact everything that is in my house as furniture.

"4th. I will and devise that all the rest, residue and remainder of my property, real, personal or mixed, that I own at the date of my death, shall be divided equally between my brothers and sisters to-wit: John W. Darnell, Isaac Darnell, Ruth Jones, Millie Gudgell and Martha Ellen Moreland, and the nieces and nephews of my brothers and sisters who are living at the date of my

death, and my sister-in-law whose husbands are dead, viz., Dulcina Darnell and Lina Darnell, and Maggie Jones, my deceased wife's sister who resides in Urbana, Illinois, and Oddie L. Power, my great niece, all of whom mentioned are to share equally alike.

"5th. I hereby appoint my nephew, John B. Jones, and my brother, I. R. Darnell, to be the executors of this my last will and testimony, and I hereby empower them to act in said capacity without bond. I further direct them to sell all of my property both real or personal excepting, however, the house and lot above devised and furniture, and divide the proceeds of sale in accordance to the bequests mentioned aforesaid.

"In testimony whereof I have hereunto set my hand this 4th day of January, 1917."

Originally the testator had eight brothers and sisters. Two of his brothers, Burton Darnell and William Darnell, and his sister, Mary Jones, were dead at the time the will was written. Burton Darnell left surviving him a widow, Dulcina Darnell, and one child. William Darnell left surviving him a widow, Lina Darnell, and three children. Mary Jones left surviving her two children. The other brothers and sisters of the testator, all of whom were living when the will was written and at the time of his death, were I. R. Darnell, who had one child, John W. Darnell, who had eight children, Millie Gudgell, who had five children, Ruth Jones, who had five children, and Martha Ellen Moreland, who had five children.

Upon the death of the testator, I. R. Darnell and J. B. Jones qualified as executors of his will, and brought this suit for the purpose of settling the estate and having the will construed. By appropriate pleadings the contention was made that the testator, by using the words, "the nieces and nephews of my brothers and sisters who are living at the date of my death," meant to include the children of his living brothers and sisters as well as the children of those who were dead. The chancellor rejected this construction and held that only the children of the testator's deceased brothers and sister were included. Hence, the appeal.

In support of the judgment below it is argued that the testator did not mean to include all his nieces and nephews, for if he had, he would have used the words, "my

nieces and nephews," as he did in the second clause of his will. Not having done this, it must be inferred that he did not mean to include all his nieces and nephews, but only those who were the nieces and nephews of his living brothers and sisters, that is, those who bore that relation to all his living brothers and sisters, and necessarily excluding the children of his living brothers and sisters who would not be the nieces and nephews of all of them. We might with equal propriety say that if the testator had intended to include only the children of his dead brothers and sisters, he would have simply said, "and the children of my dead brothers and sisters." It is therefore clear that what the testator might have said throws but little light on the question. While it is true that the testator showed a preference for certain relatives mentioned in clauses 2 and 3, it does not appear that he intended to carry this inequality any further. On the contrary, the controlling feature of clause 4 is the testator's evident purpose to remember all of his relatives regardless of whether their parents were living or dead, even to the extent of including the wives of his deceased brothers and sister of his deceased wife. If the testator had devised the property to his brothers and sisters and had not included his sisters-in-law, we might be able to agree with counsel for appellees that the words, "and the nieces and nephews of my brothers and sisters," did not include any of the children of his living brothers and sisters on the theory that he did not intend to include both parents and children. But the force of this argument is destroyed by the fact that he remembered not only the children of his deceased brothers, but their widows as well, by providing that they should share equally with all the others in his estate. Having provided for both his brothers and sisters and his sisters-in-law, clearly there is no reason why he should prefer the children of the latter to the children of the former. Viewing the will in the light of this potent fact, we conclude that the words, "nieces and nephews of my brothers and sisters," necessarily mean those who bear that relation to some of them, and not those only who bear that relation to all of them. Not only so, but this is the natural and ordinary meaning of the words employed, and we are not disposed to adopt a construction that will result in inequality unless required to do so by the plain terms of the will. We therefore conclude that the testator intended to include as beneficiaries under clause 4 of his will the children

not only of his deceased brothers and sisters, but of his living brothers and sisters.

Judgment reversed and cause remanded with directions to enter judgment in conformity with this opinion.
Whole court sitting.

Hunt v. Garvin, et al.

(Decided January 21, 1921.)

Appeal from Warren Circuit Court.

1. Pleading—Inconsistent Pleas—Waiver.—Inconsistent pleas or statements must be taken advantage of by motion to elect (sec. 113, subsec. 4, Civil Code) and the adverse party waives objection thereto by responding to both pleas or statements without motion to elect. (Secs. 85 and 86, Civil Code.)
2. Mines and Minerals—Lease—Contracts.—To complete a well as contemplated in a lease to drill for oil or gas within a fixed time means to drill a well within the time through the overlying strata and into the oil or gas bearing formations unless oil or gas in paying quantities is sooner encountered.
3. Mines and Minerals—Abandonment.—Where drilling on a well is abandoned before the shale which overlies the oil bearing sands, is penetrated and without finding oil or gas in paying quantities the well is not completed as contemplated by the lease.
4. Mines and Minerals—Abandonment—Forfeiture.—Where the lease provided for forfeiture if a well was not completed or stipulated rentals paid within a fixed time, and the lessee began but did not complete a well or pay the rentals within the time, he abandoned and forfeited the lease, and the court did not err in declaring same void in an action instituted thereafter for that purpose by the lessors.

T. W. & R. C. P. THOMAS and J. FRANKLIN CORN for appellant.

GAINES & GARDNER for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

On June 5, 1918, the appellees, Virgil Garvin and his wife, leased to appellant 200 acres of land for a term of five years, for the purpose of drilling and operating for oil and gas thereon. It was stipulated in the lease that if the lessee failed to begin a well on the premises within one year or to complete same within eighteen months from the date of the lease it was to become null and void,

but that a forfeiture could be prevented by the lessee paying to the lessor one dollar per acre per year in advance for each year the completion of a well was delayed; and that the completion of a well within the time agreed upon should operate as a full liquidation of all rentals during the remainder of the term of the lease.

On January 20, 1920, the lessors instituted this action against the lessee to have the lease declared "abandoned, forfeited and void" and to enjoin the lessee from claiming any further rights thereunder.

It was alleged in the petition that lessee had begun a well within a year and completed it more than six months before the filing of the petition, but that neither oil nor gas was found in paying quantities; that thereupon the lessee "removed the drilling machine and abandoned this lease and made no further effort either to drill or pay any rental."

By answer filed February 21, 1920, lessee traversed the allegations of the petition except the averments that he had begun and completed a well on the land. In a separate paragraph he alleged that he had begun and completed a well on the land within the agreed time at great expense; that such completion of the well relieved him of any obligation to pay rentals, and that he "intends in good faith to further develop said property for oil and gas within a reasonable time, considering the location of said leased premises and the condition of oil development in said territory and within the five year term provided by said lease."

On March 12, 1920, plaintiffs filed a pleading styled a reply in which they denied that lessee had begun a well within a year or completed same within eighteen months, alleging that they had learned since filing their petition that the well was never completed within the meaning of the lease; that the completion of a well as contemplated by the lease and understood by the parties meant a drilling below the shale and into the oil bearing sands thereunder; that drilling was abandoned before reaching the shale or oil bearing sands. This pleading was traversed of record by consent. On or about May 15, 1920, \$200.00 was tendered as rentals by defendant to plaintiffs, and by them refused. Proof was taken on the issues thus formed, and on June 8, 1920, upon submission a judgment was rendered declaring the lease had been abandoned and was null and void. The lessee appeals.

It is first urged that the action is for an abandonment only and not for a forfeiture since the petition alleges that a well was begun and completed according to the terms of the lease, which was as therein provided a full liquidation of all rentals for the entire term; that having pleaded abandonment in the petition, a forfeiture could not be pleaded by reply upon inconsistent averments.

Even if the pleas were inconsistent, which we do not hold, and although the allegations of the two pleadings are inconsistent, having responded to the reply without moving for an election as provided by section 113, subsec. 4, of the Code, appellant waived the question. Civil Code, sections 85 and 86; *L. & N. R. R. Co. v. Kimbrough*, 115 Ky. 512.

Much of briefs of counsel is devoted to an interesting discussion of the technical differences between a forfeiture and an abandonment, and what constitutes an abandonment of such a lease as this after a dry well has been drilled, but in our view of the evidence we need not consider those questions.

The witnesses agree that the lessee drilled only 350 feet and then voluntarily abandoned drilling at that place, moving his machinery off of the premises, and there is no evidence that he intended to drill that well or hole any deeper; upon the other hand he contends it is a completed well. He did not pay or offer to pay rentals until May 15, 1920, or some months after they were due, if due at all; hence there was a forfeiture and the lease became null and void by its very terms unless the 350 feet hole drilled was a completed well.

Upon this question H. E. Cowling, who qualified as an expert, testified that a completed well is one that is drilled down into what is known as the pay sand; that before reaching such sand in Warren county you must go through the limestones and shales and usually what is called the cap rock; that a well is not completed until drilled through these formations and into the sands thereunder unless oil in paying quantities is sooner encountered and not then unless both parties are satisfied.

Mr. Linderman, who was employed by the lessee to drill the well, testified that he contracted to drill only 350 feet and that when he reached that depth he quit because when he saw what the conditions were he did not think there was much chance of getting oil by drilling deeper.

Mr. Bradberry, the subcontractor, who actually did the drilling, testified that he only contracted to drill 350 feet and this he did but he did not go down to shale.

Virgil Garvin testified about when the machinery was removed, etc., and was asked, "Did they drill down to shale?" and answered, "They say they did—I don't know much about it." Robert Garvin gave about the same answer to the same question.

This is all of the testimony on this question, and we have the uncontradicted evidence of the only witness who testified about the matter, that a well is not completed until it goes through the shale into the sand beneath, the positive statement of the man who did the drilling that he did not go down to shale, with nothing to the contrary whatever, except the statements of Virgil Garvin and his son Robert that "They say they did" go down to shale, which is of course no evidence at all.

We are therefore of the opinion that the lessee abandoned the well before completion without intention to complete it and that when he did so and did not pay the rentals when due he demonstrated his intention to abandon and forfeit the lease, and that plaintiffs have proven both an abandonment and a forfeiture.

It is also suggested by counsel for appellant that a forfeiture was prevented by the tender of rentals on May 15, 1920, some months, but less than a year, after they were due by reason of the provisions of section 3 of chapter 24 of the 1920 Session Acts of the legislature, "That the drilling of one non-productive well shall be sufficient consideration for the discharge of rentals of holders of said contract and lease for a period of twelve months after its completion, etc." But this provision does not apply because appellant did not bring himself within its terms by completing any kind of a well, and also because this act did not become effective until after the pre-existing lease by its terms had become forfeited and of no effect.

Wherefore the judgment is affirmed.

Welch, et al. v. Jenkins, et al.

(Decided January 21, 1921.)

Appeal from Anderson Circuit Court.

1. Appeal and Error—Review.—An error of the trial court in the trial of an action at law can not be reviewed upon appeal, unless the error is set out and relied upon in the grounds for a new trial.

2. **Appeal and Error—Setting Verdict Aside.**—A verdict of a properly instructed jury will not be set aside on the ground that the evidence is not sufficient to support it, unless the verdict is palpably against the evidence.
3. **Damages—Excessive Damages.**—A verdict for damages will not be held to be excessive, unless it appears at first blush to have been caused by passion or prejudice on the part of the jury.

DENNIS DUNDON and J. E. PLUMMER for appellants.

L. H. CARTER for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HURT.—
Affirming.

On the 5th day of August, 1918, the appellant, W. M. Welch, entered into a contract with the appellees, J. W. Jenkins, and Albert Morris, by the terms of which he agreed to sell to the appellees a farm, near VanBuren, containing 170 acres, a quantity of tobacco sticks, and the right to put a number of cattle, at pasturage, upon the land, between the date of the contract and the first day of January, following, in consideration of the sum of \$5,000, of which sum \$500.00 was to be and was paid, at the date of the contract, \$1,662 2-3, was to be paid on January 1st, 1919, at which time the appellant was to execute and deliver to the appellees a deed of conveyance for the land and tobacco sticks, and to deliver the possession to them. The remainder of the consideration agreed upon was to be paid by appellees, in three equal annual installments, and a lien retained in the conveyance to secure the payment. The contract was reduced to writing and executed by the parties on the day it was agreed upon. The appellant, Welch, refused to carry out and perform the contract, and the appellees instituted this action to recover from him, the damages, which they claimed to have suffered from appellant's breach of it. About eleven months after the date of the execution of the contract, the appellant, Welch, was by a judgment of the county court, declared to be incompetent to manage his estate and a committee was appointed for him, and duly qualified, and who was, also, made a party defendant to the action, and is an appellant, here. An answer was filed by Welch, in which he sought to escape liability upon the contract by averring that at the time of its execution, he was drunk from the use of intoxicating liquors, and therefore did not comprehend the nature of

his acts. This averment was denied by a reply. After the committee was appointed, she filed an answer averring, that when the contract was entered into appellant, Welch, was drunk, and was, also, of unsound mind. These averments were denied by a reply. The answer, also, denied the allegations of the petition and amended petitions touching the damages claimed to have been suffered. The trial resulted in a verdict of the jury, in favor of appellees, finding for them, the \$500.00 which they had paid upon the purchase price of the land, and the further sum of \$2,000.00, in damages for the breach of the contract and the court adjudged accordingly. No complaint is made of the instructions to the jury, and it is conceded, that the measure of damages prescribed by the instructions is correct. The only issues submitted to the jury, were the ones touching the mental soundness of appellant, and his ability to make and enter into the contract, and the issue as to the damages claimed. Instructions, other than the ones given by the court were not offered.

A reversal of the judgment, however, is sought upon three grounds.

First: The court erred in the admission and rejection of testimony.

Second: The verdict is not supported by the evidence.

Third: The damages allowed are excessive.

(a) The alleged errors of the trial court, in the admission and rejection of testimony was not made a ground for a new trial, in the trial court, nor there relied upon, and for that reason, we are precluded from considering such grounds for reversal, here. By a long line of adjudications, it has been consistently and uniformly held, that errors of the trial court in the trial of an action at law are not a subject of review upon appeal, unless the error is set out and relied upon in the grounds for a new trial. Otherwise, it is considered, that if a party fails to bring an alleged error to the attention of the trial court, in his grounds for a new trial, he has elected to waive the error, if one has been made. *Harris v. Southern Ry. Co.*, 25 K. L. R. 560; *L. C. & L. R. R. Co. v. Mahoney*, 7 Bush 238; *McLain v. Dibble*, 13 Bush 297; *Commonwealth v. Williams*, 14 Bush 297; *Alexander v. Humber*, 86 Ky. 569; *Acme Mills & Elevator Co. v. Rives*, 141 Ky. 783; *Hatfield v. Adams*, 123 Ky. 422; *L. & N. R. R. Co. v. Wilkins' Gdn.*, 143 Ky. 575; *City of Frankfort v. Buttmer*, 146 Ky. 818; *L. & N. R. R. Co. v. Com-*

monwealth, 154 Ky. 294; L. & N. R. R. Co. v. Culbertson, 158 Ky. 561; Slater v. Sherman, 5 Bush 206; Jones v. Worden, 90 Ky. 230; Gooch v. Williams, 156 Ky. 282.

(b) There was an entire failure to prove, that at the time of the making of the contract, appellant, Welch, was suffering from intoxication, and hence, the court was not called upon to instruct the jury upon that subject. The cashier of a neighboring bank was called upon by appellant, Welch, to prepare the contract between him and appellees, and this witness testifies to having observed nothing which indicated unsoundness of mind, in his appearance, conversation or actions. No witness was offered, who proved, that at or previous to the making of the contract the appellant, Welch, had ever shown any indications of unsoundness of mind, although one witness testified that he had at certain times, suffered from what appeared to have been epileptic convulsions, and two physicians depose, that over a year after the making of the contract, they examined him, and from his history, they were of the opinion, that he was afflicted with epilepsy, which in some persons has a tendency to weaken the mind. No neighbor or acquaintance was offered, although several of them testified as to the value of the farm, who was inquired of or deposed to any knowledge of appellant being afflicted with epilepsy, or ever having exhibited any indications of unsoundness of mind. The measure of damages relating to the refusal of appellant to perform the contract to convey the land, the court instructed the jury, was the difference between the price at which appellees had contracted to purchase it, and its reasonable market value on the 1st day of January, 1919, when, according to the contract, the conveyance was to have been made and possession delivered. The contract price was about \$30.00 per acre, and five or six witnesses deposed that its market value on January 1st, 1919, was from \$40.00 to \$50.00 per acre. These witnesses were farmers and deposed to the knowledge of the value of the land and lands in its neighborhood. About an equal number of witnesses deposed that its value on January 1st, 1919, did not exceed \$20.00 to \$30.00 per acre. It was within the province of the jury to determine the credibility of the witnesses and the weight to be given their testimony, and the fact, that it accepted the testimony of the witnesses, who fixed the value of the land at from \$40.00 to \$50.00 per acre, rather than those who deposed that it was of less value on Jan-

uary 1, 1919, does not present a case of an insufficiency of evidence to support the verdict. The evidence was ample to support the verdict, if the jury believed it. A verdict of a properly instructed jury, will not be set aside, on the ground that the evidence is not sufficient to support it, unless the verdict is palpably against the evidence. Denker Transfer Co. v. Pugh, 162 Ky. 818; Adams Express Co. v. Tucker, 161 Ky. 741; Kincaid v. Bull, 159 Ky. 527; L. & N. R. R. Co. v. McArthur, 163 Ky. 291; Thompson v. Thompson, 93 Ky. 435; Page v. Carter, 93 Ky. 192; Hemstein v. Depue, 24 R. 886; McClain v. Esham, 17 B. M. 146; Bell v. Keach, 80 Ky. 42.

(c) The appellees' claim for damages rested upon the claim that the land on the 1st day of January, 1919, at the time when the appellant agreed to convey it to them and deliver the possession, was largely in excess of the contract price, and in addition to that item of damages, the damages sustained by them, by the refusal of appellant to deliver them a large quantity of tobacco sticks and permit them to pasture the land between the date of the purchase and the 1st day of January, 1919, were, also, relied upon as items of damages. The jury fixed all the damages which they had suffered, arising from the different elements, at the sum of \$2,000.00. The jury seems to have arrived at the conclusion from the evidence, that the increase in the value of the land between the date of the contract and the date when it should have been conveyed, under the contract, was from ten to twelve dollars per acre. It is apparent from the testimony of the witnesses, who testified for appellees, and whose testimony the jury seems to have accepted, that the verdict in damages was not excessive, as some of the witnesses for appellees fixed the value of the land on the 1st day of January, 1919, at as much as \$50.00 per acre, and the witness for appellees who fixed it at the lowest value on that date, was of the opinion that it was of the value of \$40.00 per acre. Under this evidence, it can not be said that the damages were excessive. To be excessive the damages must be such as to strike the mind at first blush as having been superinduced by passion or by prejudice, and a verdict for damages will not be set aside except for being excessive, or for having been estimated upon an erroneous measure. L. & N. R. R. Co. v. Fox, 11 Bush 495; L. & N. R. R. Co. v. Long, 94 Ky. 410; New Bell Jellico Coal Co. v. Sowders, 162 Ky. 443; Northeast Coal Co. v. Setzer, 169 Ky. 245; Shirley v. Billings, 8 Bush 147; Letton v. Young, 2

Met. 558; L. & N. R. R. Co. v. Thomas' Admr., 107 Ky. 145.

No error reviewable upon the record appearing, the judgment is therefore affirmed.

Barrow, et al. v. Bradley, Mayor, et al.

(Decided January 28, 1921.)

Appeal from Fayette Circuit Court.

1. **Municipal Corporations—Taxation.**—The power of a city to expend or contract to pay public funds is limited to the power to tax.
2. **Taxation—Power to Tax.**—The power to tax is a sovereign power legislative in character.
3. **States—Memorial Buildings—Monuments—Use of Public Money.**—The reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals is for a public purpose, and within the power of the state legislature.
4. **Municipal Corporations—Taxation.**—While as a general proposition the legislative branch of a state can not delegate sovereign powers, the power to create local governmental agencies comes with the power to confer upon such municipalities the power to tax for municipal purposes.
5. **Municipal Corporations—Local Self Government—Delegation of Power.**—Section 156 of Kentucky Constitution confers upon the General Assembly of the Commonwealth authority to delegate to cities and towns all powers needful for local self government.
6. **Municipal Corporations—Bonds.**—Cities of the Commonwealth have no inherent power to issue bonds (sec. 162 of the Const.); and same are void unless the express authority of law therefor can be found in the charter.
7. **Municipal Corporations—Bonds for Erection of Memorial Buildings.**—Charters of cities of the second class do not contain express or implied authority for such cities to issue bonds for the erection of a memorial building for those citizens of the city and state who lost their lives in defense of the nation.
8. **Municipal Corporations—Powers—General Welfare Clause.**—The powers conferred upon municipalities must be construed with reference to the object of their creation as agencies of the state in local government, and a general welfare clause added to a grant of enumerated powers in a city charter confers no other powers than such as are within the ordinary scope of municipal authority or which are necessary to accomplish municipal purposes.

9. Municipal Corporations—Powers.—Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.
10. Municipal Corporations—Powers.—The exercise of a power by a municipality to be valid must be reasonable.

ED. C. O'REAR and WM. L. WALLACE for appellants.

WM. H. TOWNSEND, HARRY B. MILLER and JAMES A. WILMORE for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Lexington is a city of the second class and has adopted the commission form of government under which all legislative functions of the city are vested in the mayor and four commissioners who now are appellees and were defendants below.

The plaintiffs, now appellants, who are citizens and taxpayers of the city, instituted this action for themselves and on behalf of all other citizens and taxpayers, for mandamus to compel defendants to issue and sell \$75,000.00 of city bonds and to apply the proceeds to the erection of a building in Lexington upon the grounds of the University of Kentucky as a memorial to the citizens of Lexington and Kentucky who gave their lives in defense of the nation in the late war with Germany and her allies.

A general demurrer to the petition having been sustained same was dismissed upon plaintiffs' refusal to plead further and they have appealed.

The petition set out in detail the enactment in strict accord with the prescribed procedure of ordinances declaring it to be a matter of public welfare and municipal concern that the proposed memorial be erected, authorizing an indebtedness of \$75,000.00 and the issuance of bonds in that amount for the purpose and providing for the submission of the proposed indebtedness to the legal voters of the city; that at an election regularly held for the purpose and properly certified the indebtedness was authorized by more than a two-thirds majority, and that the same when so authorized does not exceed the constitutional limitation.

The first, if not the only question involved, therefore, is whether the city in any event had the power to appropriate funds or incur an indebtedness for the purpose proposed.

That the power of a city to expend or contract to pay public revenues is limited by the power to tax is too obvious for argument, as is also the proposition that the power to tax is a sovereign power, legislative in character. Generally all such powers are conferred upon and may be exercised only by the legislative branch of the government, except as otherwise provided by the Constitution. Section 171 of our Constitution declares that, "Taxes shall be levied and collected for public purposes only." Unless therefore the proposed indebtedness is for a public purpose it is prohibited by the Constitution and would be invalid even if it had been proposed by the General Assembly of the Commonwealth.

But it is so well settled now that the reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose that it hardly seems necessary to devote time to a discussion of this branch of the case. *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998; 11 L. R. A., 123 and note; 19 R. C. L. 722; *Judson on Taxation*, section 349.

That this precise question has never before reached this court is significant in view of the fact that upon the statute books and throughout the state are many evidences of such expenditures by the General Assembly of the Commonwealth, and we have no doubt that such expenditures are for a public purpose and valid when so authorized.

And while as a general proposition the legislative branch of the state can not delegate sovereign powers confided to it, the power to create municipal corporations for purposes of local self government by necessary implication as is uniformly held carries with it the power to confer upon such municipalities, as local governmental agencies, the power to tax. When, therefore, the power to create municipalities is vested in the state legislature the power is implied if not expressed to confer and define local legislative power and is practically unlimited in the absence of constitutional restrictions.

By our present Constitution, however, in section 156, it is provided that the cities and towns of the Commonwealth for the purposes of their organization and government shall be divided into six classes, and that "The organization and powers of each class shall be defined and provided by general laws, so that all municipal corpora-

tions of the same class shall possess the same powers and be subject to the same restrictions." And the General Assembly is required to assign cities and towns to the classes to which they respectively belong; to change assignments, provide by general law how towns may be organized and to enact laws for the government of such towns until assigned to one or the other of the six named classes.

It is apparent, therefore, that our state legislature has express power to delegate to cities and towns all powers needful for local self government, and it can not be doubted that when pursuant to this provision of the Constitution the General Assembly has provided by general laws for the organization and defined the powers of cities of these several classes and assigned Lexington to the second class that its powers are limited as thus defined.

Yet it is asserted upon authority of 8 Cyc., 779; *Lexington v. Thompson*, 68 S. W. 477; *Western Son. Fund Soc. v. City of Philadelphia*, 31 Pa., 183; 172 Am Dec., 730; *McDonald v. Louisville*, 68 S. W. 413; *Overall v. Madisonville*, 125 Ky. 684, and *ex parte City of Paducah*, 125 Ky. 610, that the city of Lexington has the inherent power to issue the proposed bonds.

But an examination of these authorities discloses the fact that they deal with an entirely different phase of municipal affairs, viz: the capacities and powers of a municipality not as a local state agency but rather as a private corporation, and of the right of the legislature to interfere in the local management of such affairs of a private nature as theretofore have been conferred expressly or impliedly upon the city as a franchise by the legislature.

Obviously such authorities give no support to the contention that a city has inherent power to levy taxes for public purposes, as here attempted, and which manifestly it can do only in the exercise of its public functions delegated to it as a local state agency by the legislature.

Moreover section 162 of the Constitution declares that: "No county, city, town or other municipality shall ever be authorized or permitted to pay any claim created against it under any agreement or contract made without express authority of law and all such unauthorized agreements or contracts shall be null and void."

Consequently the city has no inherent power to issue the proposed bonds, and they are void unless the "ex-

press authority of law" therefor can be found in the charter of cities of the second class, which is the only express authority of law given the city of Lexington to levy taxes for public purposes.

Assuming that the term "express authority of law" as thus used in the Constitution is to be construed as meaning not only that which is expressly stated but also that which is necessarily included or implied from what is expressly said, as we apprehend but do not decide it should be construed, we will examine the provisions of the charter of cities of the second class under which it is claimed the desired power is conferred.

These provisions are section 3038 and subsections 3 and 16 of section 3058, which read as follows:

3038. "The cities of Covington, Newport and Lexington are hereby declared to be cities of the second class, and the inhabitants thereof, and of such other cities as may hereafter be declared cities of the second class, respectively, are created and continued bodies corporate and politic, within their respective limits, with perpetual succession, by the name and style which each now respectively bears, with power to govern themselves in all fiscal, prudential and municipal concerns by such ordinances and resolutions as they may deem proper, not in conflict with this act or the Constitution of the State of Kentucky or the Constitution of the United States; to acquire property for municipal purposes, by purchase or otherwise, within their corporate limits or elsewhere; to hold the same and all property and effects now belonging to the said cities, held either in their own name or in the name of others, for the use of each of said cities, for the purpose and interest for which the same were granted or dedicated; to use, manage, improve, sell, convey, rent or lease the same; and to have like power over property hereafter acquired, and as such, by their respective names, shall be capable in law of contracting and being contracted with, of suing and being sued, of pleading and being pleaded, answering and being answered, in all courts and places, and in all matters whatsoever; and shall have and use, respectively, a corporate seal, and make, change, alter and renew the same at pleasure. (Paducah was transferred to this class by act of March 21, 1902.)"

3058-3. "To provide for the levying, assessment and collection of taxes, as provided in this act, upon all property made taxable for state purposes within the limits of

the city, and not exempted by general law from municipal taxation."

3058-16. "To establish, erect and maintain a city prison, a workhouse, a house of correction, a house of refuge, and all other municipal buildings; make all needful regulations, and appoint all proper persons and assistants therefor; to purchase, rent or lease, within the limits of the city or elsewhere, any real or personal property for the use of the city, and to control, manage, improve, sell, lease or otherwise dispose of the same, for such purposes and considerations as they may deem proper for the public welfare."

Section 3038 is the first section of the act which is the charter of cities of the second class and plainly was intended merely to designate the cities belonging to the class and to state generally that they were corporate bodies with power to conduct purely local fiscal, prudential and municipal affairs by ordinances and resolutions as defined by the numerous other provisions of the charter and not in conflict with the state or federal constitution. This is made entirely clear from the fact that section 3058 is headed "General Powers" and begins "The general council shall have power by ordinance." Then follows twenty-seven subsections carefully defining the powers conferred, in no one of which is found express authority to expend money or levy taxes for a memorial building or like structure. The purposes deemed public and for which public money can be used are designated specifically or at least generically, including the following subjects: "quarantine and health," "quarries," "nuisances," "suppression of illegal businesses," "water supply, bridges, culverts and sewers, lights, market houses, and *other buildings*, inspection of food materials, *public grounds*, regulation of intoxicants, weights, measures, riots, protection of the city's rights, support of the insane and inebriates, taking census, purchase and maintenance of city prison, workhouse and *other buildings*, restrain and punish vagrants, beggars, etc., regulate and license dogs at large, control of streets, railways and telegraph, telephone and light poles and wires, fire department, parks, cemeteries and *public grounds*, good government, eminent domain, the levy, collection and appropriation of money, etc."

Subsection 3 relied upon authorizes the levy, assessment and collection of taxes, "as provided in this act,"

and obviously can not of itself authorize a tax not provided for elsewhere in the act.

That the powers thus enumerated and defined refer to "public grounds" and "public buildings" twice each is quite persuasive that the power to erect a memorial building, if the legislature intended to grant it, must be found by implication in one or the other of the subsections dealing with these subjects. Certain it is that such power is not granted expressly or by fair implication elsewhere; nor can such power be fairly implied from any of the four subsections dealing with grounds or buildings unless from subsection 16 *supra* as seems to be conceded by counsel for appellants, since they only contend that in this of these four sections is the power granted.

This subsection of the statutes has been considered by this court in *Board of Trustees House of Reform v. City of Lexington*, 112 Ky. 171, and *Wilkerson v. City of Lexington*, 188 Ky. 381. In the former case an appropriation by the city of \$5,000.00 toward the expense of procuring a site for and the erection thereon of a house of reform outside of but near the city and to which the city had the right to send its incorrigible juveniles was held to be authorized under this provision of the charter. A house of reform, however, is clearly a building of the same kind as those there authorized if not in fact actually named as a house of correction or house of refuge.

The difficulty in that case was not in determining that the city had the power to erect and maintain a house of reform, as clearly it did, but whether it had the right to contribute city funds to the erection of such a building by the state. That case is authority here if at all for the contribution by the city of its funds to the erection of a memorial by some other agency upon grounds of the University of Kentucky; that is, the manner in which a possessed power can be exercised. But obviously we have not yet reached that question since if the city had no power itself to erect the memorial upon grounds of its own, it could not contribute its funds to such a purpose by another upon ground it did not own and can not control.

The latter of the two cases mentioned above is much more nearly in point as to whether the proposed building is of the character the city may erect and maintain, which is the question we are now considering. In that case we held that under subsection 16 of section 3058 the city had

authority to purchase a site and erect thereon a suitable building for municipal offices, and to include therein a commodious and convenient public auditorium; and it is evident that the authority for building a public auditorium was the only troublesome feature so far as the character of the building was concerned, since a building for municipal offices is clearly a "municipal building" expressly authorized by the first portion of the section.

It is further evident that authority for the inclusion of a room to be used as an auditorium in such a building was found in the latter portion of the same subsection reading: "to purchase, rent or lease within the limits of the city or elsewhere, any real or personal property for the use of the city and to control, manage, improve, sell or otherwise dispose of same as they may deem proper for the public welfare."

As we there said: "Clearly the power to purchase and improve real estate for such purposes and considerations as the board of commissioners may deem proper for the public welfare is very broad and comprehensive," so broad in fact we think that it is limited only by the term "public welfare," but as applied of course to a municipality and not to the county, state or nation. Certainly no authority could be found here for the city to expend money for a county court house or any other public building not municipal in character.

It is a familiar rule of construction that "The powers conferred upon municipalities must be construed with reference to the object of their creation, as agencies of the state in local government." Cooley's Const. Lim. 309. And as said in 28 Cyc. 705, a general welfare clause added to a grant of enumerated powers in a city charter confers "no other powers than such as are within the ordinary scope of municipal authority or which are necessary to accomplish municipal purposes."

Another pertinent rule of construction is thus stated in Dillon's Munic. Corp., 5th ed. section 237: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by

the courts against the corporation and the power is denied." To the same effect are *Cooley's Const. Lim.* 270; *Henderson v. City of Covington*, 14 Bush 312; *Mayor, etc. v. Wilson, etc.*, 103 Ky. 326.

Considering therefore subsection 16 as a whole in the light of these authorities we feel sure it can not be construed to confer upon the city power to erect a memorial building to the citizens of Lexington and Kentucky who lost their lives in defense of the nation, since it is extremely doubtful to say the least if such an undertaking is a matter of municipal public welfare, or within the ordinary municipal authority or necessary to accomplish municipal purposes.

We need not therefore consider the manner in which the city was attempting to use the power to see if it was reasonable, as an exercise of any power to be valid always must be.

Judgment affirmed.

Wayne, By, etc. v. Brumley, et al.

(Decided February 1, 1921.)

Appeal from Daviess Circuit Court.

1. Judgment—After-Born Remaindermen.—A judgment in an action by an executor to sell land for the payment of debts, specific devises, and costs of administration, is not void as to an after-born remainderman where all the jurisdictional facts appear upon the face of the papers.
2. Judgment—Collateral Attack.—Such judgment being only voidable, can not be made the subject of a collateral attack for fraud by such after-born remaindermen.
3. Judgment—Collateral Attack.—An action, wherein it is alleged that the plaintiff is the owner of an undivided interest in a given tract of land, and the defendant answers relying upon a judgment of court as his source of title, and the plaintiff, for the first time, in his reply charges that the judgment in the action relied upon was obtained by fraud, is a collateral attack and can not be maintained.
4. Judgment—Collateral Attack.—A direct attack on a judgment is an action, motion or proceeding for the specific and only purpose of setting aside or annulling the judgment of a court; and any action which has for its purpose any relief other than the setting aside of the judgment is a collateral attack.
5. Judgment—Remaindermen.—The creditors of a decedent can not be indefinitely postponed in the collection of their debts because

there may be in the future additional remaindermen under the terms of a will; and in such action the remaindermen in existence will be considered as representing all remaindermen of the same class who may thereafter come into existence, and such representative not then in esse is bound by the judgment.

GEORGE W. JOLLY for appellant.

LOUIS I. IGLEHEART for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

In 1899 Mary L. Wayne died in Daviess county, leaving a will in which she devised all of her property, subject to the payment of her debts and of certain specific devises, to Mary M. Wayne, the wife of her son, J. Z. Wayne, for and during her natural life, and in remainder to their children; but further providing that if her son, J. Z. Wayne, should survive his said wife, to him for his life and in remainder to his children.

Her daughter-in-law, Mary M. Wayne, died a short time after the testatrix, whereupon the latter clause referred to became effective. At the time the will was written, and at the death of the testatrix and of Mary M. Wayne, the latter and her husband had only two children, both infants.

In the will of Mary L. Wayne her son, J. Z. Wayne, was nominated as executor, and after her death the will was probated and he qualified as such.

The decedent, Mary L. Wayne, left very little, if any, personal property, and her estate consisted almost entirely of a tract of 108 acres of land in Daviess county, upon which there was an unpaid mortgage debt of \$1,500, and she in her will made specific devises amounting to \$800.

After the death of his wife, J. Z. Wayne married again about the year 1903, and as a result of this union the appellant, Charles R. Wayne, was born on November 8, 1904.

Prior to his birth, however, and in 1903, J. Z. Wayne, as executor, brought a suit to settle the estate, in which action the creditors and all devisees, including the two infant children by his first wife, were made defendants, and in that action he alleged that it would be necessary to sell the tract of 108 acres of land for the purpose of paying the debts, specific devises and costs of administration,

and that the tract of 108 acres could not be divided without materially impairing its value and the value of the several interests therein.

On October 20, 1903, a judgment was entered in that action directing a sale of the whole of the 108 acres of land and adjudging the same to be indivisible, and pursuant thereto the master commissioner on the 16th day of November, 1903, sold this land, and J. Z. Wayne became the purchaser at the price of \$7,400, although it had been appraised before the sale at only \$5,000, and on the 19th of December, 1903, an order was entered confirming the report of sale.

All of these things took place before the birth of appellant, Charles R. Wayne, which, as stated, was on the 8th of November, 1904.

On the 12th of November, 1904, an order was entered in the action showing that J. Z. Wayne, the purchaser at the sale, and who had executed the purchase money bonds, had assigned in writing the benefit of his bid to J. S. Brumley, and thereafter, Brumley having satisfied the purchase money bonds, a deed for the land was made to him and the proceeds of the sale were distributed under orders of the court.

That record further shows that before the final distribution of the fund J. Z. Wayne had qualified as the statutory guardian of the appellant, Charles R. Wayne, and as such appeared in that action and executed the additional bond required before withdrawing the fund.

On the 4th of January, 1918, the infant appellant, Charles R. Wayne, by J. P. Wayne, his half brother as next friend, brought this action against J. S. Brumley.

In his petition it is alleged that he is the son of J. Z. Wayne and the grandson of Mary L. Wayne, and that under the will of the latter he was the owner of and entitled to the possession of an undivided one-third interest in and to the tract of 108 acres; that Brumley had theretofore acquired the interest of J. Z. Wayne and his two children by his first marriage, J. P. and Francis E. Wayne, and "prays judgment that his right to an undivided one-third interest in said tract of 108 acres more or less be established and adjudged to him and that his title and interest thereto be quieted."

The defendant, Brumley, answered, setting up at length and in great detail the pendency of the action to settle the estate of Mary L. Wayne and of all orders, judgments and steps taken therein, and pleading affirma-

tively that all the devisees and creditors of Mary L. Wayne were parties thereto, including the two infant defendants who were children of J. Z. Wayne by his first wife; that the said two infants had in that action a guardian *ad litem* appointed for them, who had represented them and filed his report as required by law; that after the birth of the infant, Charles R. Wayne, pending that action, J. Z. Wayne, the father of said infant, had qualified as his statutory guardian and had appeared in that action and entered his appearance by executing bond therein and withdrawing as such guardian the proceeds of the sale which were coming to said infant, and that said statutory guardian and the subsequent statutory guardian of the appellant had ever since had said fund and loaned the same.

He also alleged that in that action it had been averred by the executor in his petition that the 108 acre tract of land was all the property owned by Mary L. Wayne at her death and that it was necessary for the payment of her debts, the specific devises, and cost of administration, to sell the same, and that the same could not be divided without materially impairing its value and the value of the several interests therein; that in that action depositions were taken on interrogatories as required by law which showed that the land was indivisible, and the court in accordance therewith ordered a sale of the whole tract of land, and he relied upon the judgment and sale and other proceedings in that action, and the title he acquired thereunder, as a complete defense to the plaintiff's action.

To that answer the plaintiff replied denying that the tract of 108 acres could not be divided without materially impairing its value or the value of the several interests therein, and denying that a sale of the whole was necessary to pay the debts, and denying that the infant plaintiff was ever made a party to said action.

In a separate paragraph of the reply it is alleged that the judgment in that action was procured by fraud, covin, misrepresentation and perjury and subornation of perjury committed by the defendant, Brumley, who, it is alleged, lived at that time in the immediate neighborhood of said land and was well acquainted therewith and knew that said land was in fact susceptible of division without impairing its value; and that said Brumley had testified falsely in that action that the land was not susceptible of division, knowing the same to be untrue; and had further-

more fraudulently procured one C. A. O'Bryan to swear falsely to the same thing, knowing at the time such evidence was false; and so falsely testified and procured O'Bryan to testify for the fraudulent purpose of procuring the sale of the whole of said land that he might himself buy it.

It is further alleged that Brumley fraudulently procured J. Z. Wayne, the executor, to participate in securing said judgment of sale by plying the said J. Z. Wayne with whiskey until he had rendered him incompetent to attend to the business; and that said J. Z. Wayne did fraudulently participate in and combine with Brumley, and aided and assisted him to procure said judgment to deprive the remaindermen of their interest in said land, and that the purchase by J. Z. Wayne at the master commissioner's sale, and the confirmation thereof, and the assignment of the bid to Brumley, were each a part of the fraudulent combination entered into by the parties; and that all steps, orders and judgments therein looking to such sale were had and made pursuant to the fraudulent combination between Brumley and J. Z. Wayne.

In the prayer of his reply for the first time he asks that "all judgments, steps and orders made in that action looking to the sale of said land, and the confirmation thereof, and the distribution of the proceeds thereof, be adjudged to have been procured by fraud and held void altogether, or if that can not be done, that the same be adjudged void as to the infant plaintiff, and his rights and interests in said land be established."

To this reply Brumley rejoined, putting in issue all the material facts alleged.

And this is the substance of the pleadings in this action.

Three questions are presented for decision: (1) was the judgment of sale void or only voidable? (2) If it was merely voidable is this a direct or a collateral attack upon it? And if only a collateral attack, can the action be maintained? (3) Was appellant a party to that action, and if not, is he bound by the judgment therein under the doctrine of representation?

(1) It will be seen from our recitation of the contents of the pleadings that there is no claim that the court did not have jurisdiction, or that any jurisdictional fact did not appear upon the face of the papers in the old suit. On the contrary, it is affirmatively shown that every requisite jurisdictional fact appeared; that the decedent

died a resident of that county; that the executor qualified; that the land was in that county; that all interested parties then in existence were before the court; that a guardian *ad litem* was appointed for each of the infants and answered for them; that the petition alleged, and the evidence showed, that the land could not be divided without materially impairing its value and the value of the several interests therein; and from this it is apparent that if the judgment was void as to appellant, it was only for the reason that he was not then *in esse* and consequently not a party thereto, as is claimed, and whether he was such party by representation will be hereafter considered.

(2) Under the allegations of the reply, therefore, the judgment was only voidable if it was obtained in consequence of a fraudulent combination between Brumley and J. Z. Wayne as alleged; and being only voidable, is the attack which is here made upon it a direct or only a collateral attack?

The petition in this case alleged that the plaintiff was the owner of a one-third undivided interest in the tract of land, and prayed that his title thereto be quieted and his right established, and wholly ignored the existence of the judgment in the old suit.

The answer then relied upon the judgment in the old suit and the title which Brumley acquired thereunder as a defense to the plaintiff's claim; and then in the reply for the first time the plaintiff, in avoidance of the defendant's claim under the judgment, asserts that the judgment which is the basis of the defendant's title was procured by fraud.

That this is a collateral and not a direct attack upon the judgment is not an open question in this state.

In the case of Crider v. Sutherland, 186 Ky. 7, Crider brought suit against Sutherland to recover a small tract of land; the defendant answered asserting title to plaintiff's former interest therein under a commissioner's deed.

Plaintiff replied that he had been adjudged and was of unsound mind at the time of the rendition of the judgment which was the basis of the commissioner's deed, and the lower court held that this was a collateral attack upon the judgment and therefore sustained a demurrer to the reply, and that judgment was affirmed, this court saying:

"Where the absence of the jurisdictional fact does not affirmatively appear in the record in which the judgment was rendered, the proper remedy is to bring a suit for the purpose of setting aside the judgment, or to resort to other forms of direct attack."

A direct attack is an action or a motion for the specific and only purpose of setting aside or annulling the judgment of a court; and any action which has for its purpose the accomplishment of any relief other than the setting aside of the judgment is not a direct attack.

Dennis v. Alves, 132 Ky. 345, was an action seeking to have plaintiff adjudged the owner of and entitled to the possession of a tract of land; the defendants answered claiming the plaintiff's title under a judgment of court, and this court, in a response to a petition for a rehearing, in 117 S. W. 287 (not elsewhere printed), said:

"A judgment is directly attacked when it is called in question by a motion or proceeding for a new trial, by an appeal to a higher court, or by an action to set it aside for fraud, or any like procedure; but in this case the judgment constitutes a part of appellees' chain of title to the land in question, and, when pleaded by them, the appellants respond that the judgment is void for want of jurisdiction. This is a collateral attack, and, unless the judgment is void for want of jurisdiction, either of the subject-matter or of the persons involved in the litigation, the attack is in vain."

The two cases cited would appear to be conclusive of the fact that the attack upon the judgment in this case is a collateral attack and that it can not be maintained unless the appellant, because of the fact that he was not *in esse* at the time the judgment was entered, is not bound thereby; in other words, as to him the judgment is void unless he was a party or he is bound by the doctrine of representation.

(3) The appellant was not born until after the judgment of sale, until after it was executed, and until after the sale was confirmed, but his half brother and sister were each parties to the action and were each remaindermen and represented in that action the same interest which he would have represented had he been a party.

In this state not only has the executor of a decedent the right to go into court and ask for the sale of the real estate of his testator for the purpose of paying debts and settling the estate but the creditors themselves have that right. It can not be that because there may or may not

be in the future additional remaindermen under the terms of a will, creditors are to be indefinitely postponed in the collection of their debts, and out of these considerations the wise rule has been adopted that remaindermen in existence who are representatives of a class will be considered as representing all of that class who may thereafter come into existence, and that such representative not then *in esse* is likewise bound by the judgment.

An exhaustive note on this subject, clearly and accurately setting forth the doctrine of representation as here announced, will be found in the case of Downey v. Seib. 8 L. R. A. (N. S.) 49.

The judgment is affirmed.

Stanley v. Fiscal Court Hopkins County.

(Decided February 15, 1921.)

Appeal from Hopkins Circuit Court.

1. Officers—Public Officers—Removal for Cause—When Courts Will Interfere.—Where an officer has been appointed for a fixed term, subject to removal for cause, the sufficiency of the cause is a question of law for the courts, and where the cause alleged is legally insufficient the courts will take the necessary steps to prevent the removal of such officer or to set aside the removal and restore him to office.
2. Officers—Public Officers—County Treasurer—Violation of Statutory Duty As Ground for Removal.—Where the legislature imposes on an officer a particular duty, and makes that duty so important as to provide a penalty for its non-performance, the courts do not feel at liberty to say that a failure to perform such duty is such a slight delinquency on the part of the officer as not to amount to a sufficient cause for his removal.

J. F. GORDON and H. F. S. BAILEY for appellant.

LETCHER R. FOX and CHAS. G. FRANKLIN for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

At its April term, 1917, the fiscal court of Hopkins county elected J. B. Stanley county treasurer for a period of four years. Thereupon he qualified by appearing in open court, taking the necessary oath and executing the bond required by law. Thereafter, from time to time, he made regular settlements in the fiscal court and paid over to the proper persons all the money coming to

his hands as treasurer. These settlements were all approved by the fiscal court. On October 14, 1919, the fiscal court entered an order directing Stanley, as county treasurer, to deposit all county funds in the Hopkins County Bank at Madisonville. Stanley refused to comply with this order because there was no statute giving the fiscal court the authority to determine where the deposits should be placed. On November 15, 1919, an order was entered by the fiscal court commanding Stanley to appear on the 28th day of that month and show cause, if any, why he should not be removed from office because of his failure and refusal to deposit the funds in the Hopkins County Bank, and because of his failure to file with the judge of the Hopkins county court, within five days after such payments were made, a report in writing of each payment of money made to him as such treasurer, showing when and from whom the same was received and on what account. In obedience to this summons, Stanley appeared before the fiscal court on November 28th and filed a written response to the effect that he had deposited the funds of the county in a solvent institution, and that the fiscal court had no power or authority to direct him where he should keep his deposits. He further stated, that, in each year since he had been county treasurer, the fiscal court had appointed a commissioner to make settlements with him as county treasurer, and said settlements had been made. The settlements so made showed the amounts of all funds that came to his hands as treasurer, and from whom received and to what fund they belonged; also all sums paid out, to whom paid, the amounts thereof and the purpose for which the payments were made. These settlements were properly filed with the court by the commissioner and laid over for exceptions. No exceptions of any kind were ever filed to any of the settlements, and each and all of the settlements were approved by the court as being true and correct. Furthermore, he had properly accounted for every cent that had come to his hands as treasurer, and had promptly paid all orders of the fiscal court when presented to him for payment when he had funds with which to do so. He further alleged that no treasurer of Hopkins county had ever reported to the county judge in writing the sums that had come to his hands, and that it had never been the practice or custom to do so; that soon after the present county judge came into office, he inquired of the county judge if he desired that the respondent should make the written re-

ports to him, and the county judge had said that it was not necessary to do so; that prior to the issuing of the rule against him, the county judge had never requested the respondent, or made known to him, that he desired the written reports to be made; that acting in good faith and following along the established precedent and custom of other treasurers in not making such reports to the judge, and acting upon statement of the county judge that it was not necessary for him to do so, he did not make said reports.

After hearing the argument of counsel, the fiscal court entered an order removing Stanley from office as county treasurer. Thereafter, Stanley appealed to the circuit court and the appeal was dismissed. On appeal to this court the judgment was affirmed. *Stanley v. Fiscal Court of Hopkins County, etc.*, 189 Ky. 390, 224 S. W. 1081.

Notwithstanding the action of the fiscal court, Stanley continued to act as treasurer until December 9, 1920, when the fiscal court met and elected J. W. McDonald as treasurer. Thereupon, Stanley brought this suit against the fiscal court and the members thereof and McDonald, charging that his removal was void, and asking for an injunction restraining them from interfering with him in the performance of his duties as treasurer, and requiring the fiscal court to restore him to office. The petition also charged that he was removed because of a political conspiracy, and not because of either of the grounds mentioned in the notice. A demurrer was sustained to the petition and the petition dismissed. Stanley appeals.

Under the statute the fiscal court of a county has the power to appoint a county treasurer and to remove him from office "at any time for cause." Section 929, Kentucky Statutes. The duties and powers of a county treasurer are set forth in section 931, Kentucky Statutes, which provides in part as follows: "He shall report to the county judge in writing each payment of money paid to him as county treasurer, showing when and from whom received and on what account, and on his failure so to do within five days after payment is made, he shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding one hundred dollars." It is strongly urged in behalf of appellant, that inasmuch as he made all the settlements required by law and accounted for every dollar that came into his hands, and merely failed to make to the county judge the reports in writing re-

quired by the statute, *supra*, because of the direction of the county judge and of the custom prevailing in the county, there was an entire absence of such bad faith or such wilfulness on his part as would authorize his removal from office. It is the rule in this and other jurisdictions that where an officer has been appointed for a fixed term, subject to removal for cause, the sufficiency of the cause is a question of law for the courts, and where the cause alleged is legally insufficient, the courts will take the necessary steps to prevent the removal of such officer or to set aside the removal and restore him to office. *Reese v. Hickman County*, 187 Ky. 641, 220 S. W. 314; *State v Duluth*, 53 Minn, 238, 55 N. W. 118, 39 A. S. R. 595. In such a case the courts will not determine whether, if sitting in the place of the body authorized to make the removal, they would have taken the same action, but will confine their inquiry to the sufficiency of the cause, where it is conceded that the officer was informed of the charges and afforded an opportunity to be heard. Appellant admits that he knew of the statute but failed to comply with it because the county judge stated it was not necessary, and because it had been the custom not to comply with it. It was peculiarly the province of the legislature to prescribe the duties of the treasurer. To this end it not only provided that the treasurer should make the reports to the county judge as set forth in the statute, but further provided that a failure to comply with that duty was a misdemeanor, for which a fine not exceeding one hundred dollars could be imposed on the delinquent treasurer. Of course, this statute is mandatory in its terms and can not be set aside either by custom or by the direction of the county judge. The offense is complete if the treasurer merely fails to file the reports within the required time, and it is no defense that he acted in good faith and without any wilful intention to violate the law. Where the legislature imposes upon an officer a particular duty, and makes that duty so important as to provide a penalty for its non-performance, we do not feel at liberty to say that a failure to perform such duty is such a slight delinquency on the part of the officer as not to amount to a sufficient cause for his removal. It follows that the demurrer to the petition was properly sustained.

Judgment affirmed.

Johnson, et al. v. Beaver Creek Fuel Co., et al.

(Decided February 15, 1921.)

Appeal from Floyd Circuit Court.

1. Reformation of Instruments—Deeds—Bona Fide Purchasers.—A deed will not be reformed on the ground of mistake in the quantity of land conveyed as against a subsequent purchaser for value without notice.
2. Vendor and Purchaser—Bona Fide Purchaser—Constructive Notice.—Where the land conveyed is located in the mountains, where the quantity of land is often estimated and accurate surveys are not always made, the mere fact that the purchasers had the land surveyed, and the survey showed that a prior deed embraced a few more acres than the number stated in the description, was not sufficient to put them on inquiry to ascertain if there was a mistake in the deed.

A. J. MAY, W. P. MAY and J. C. HOPKINS for appellants.

SMITH & COMBS and FAMSETT & SMART for appellees

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

On October 27, 1909, Harvey Johnson and others conveyed to L. D. Smallwood and Jennie Smallwood a tract of land situated in Floyd county and described as follows:

“Beginning on a dogwood on a conditional line made by Harvey Johnson and David Johnson between this tract and the lands now owned by Wiley Johnson, thence up the point with said conditional line to the back line; thence down the top of the ridge on right of creek as you go up to a chestnut oak on or near *near* the top of a spur; thence down the point so as to leave to the left as you go down the point eight acres of a patent made in the name of said Harvey Johnson amounting to 150 acres, and surveyed by Dave Stephens about October, 1872, to a yellow oak standing near the mouth of *of* a hollow below L. D. Smallwood’s residence and on the right side of Beaver as you go up; thence with the said patent line up the left side of Beaver to the back line; thence with the same patent line on around to the beginning, including one hundred and forty-two acres.”

On December 27, 1912, Smallwood and wife conveyed a small portion of the above tract to Dock Johnson, the consideration being \$275.00 cash.

On February 1, 1914, Smallwood and wife conveyed all the remainder of the boundary above described to the

Beaver Creek Fuel Company, for the recited consideration of \$2,450.00 cash.

Thereafter, the Beaver Creek Fuel Company conveyed the land to the Elkhorn Gas Coal Mining Company for a cash consideration.

On August 4, 1914, Harvey Johnson and the other grantors in the deed of October 27, 1909, to Smallwood and wife, brought suit against the Beaver Creek Fuel Company, the Elkhorn Gas Coal Mining Company, Dock Johnson and L. D. Smallwood and wife, to reform the deed, alleging in substance that he agreed to sell, and the Smallwoods agreed to buy, only 142 acres at the rate of \$5.00 per acre, whereas, by mistake of the parties, some 40 or 50 acres not sold were embraced in the deed. Not only did the defendants deny the allegations of the petition, but the Beaver Creek Fuel Company, the Elkhorn Gas Coal Mining Company and Dock Johnson pleaded that they were *bona fide* purchasers for value. On final hearing the petition was dismissed and plaintiffs appeal.

Whether or not, in a suit for that purpose, plaintiffs might have recovered of the Smallwoods additional compensation for the excess in the quantity of land sold is a question not before us. This suit is not founded on the theory that they were not paid for all the land sold, but on the theory that, by mutual mistake of the parties, the deed was so drawn as to embrace land not actually sold, and for this reason the deed should be reformed.

No rule of law is better settled than that reformation of a deed will not be decreed as against a subsequent purchaser for value without notice. 23 R. C. L., p. 340; 34 Cyc. 956. It is conceded that the description in the deed embraces the land which plaintiffs claim was not conveyed, and covers all the land which the Beaver Creek Fuel Company, the Elkhorn Gas Coal Mining Company and Dock Johnson purchased. The evidence further shows that they purchased and paid for the land without any notice of any mistake in the deed. Furthermore, the lands were located in the mountains where the quantity of land conveyed is often estimated and accurate surveys are not always made, and the mere fact that the purchasers had the land surveyed, and the survey showed that the deed embraced a few more acres than the number stated in the description, was not sufficient to put them on inquiry to ascertain if there was a mistake in the deed. *Floyd's Heirs & Dev. v. Adams, et al.*, 1 A. K. Marshall 72; *Jennings v. Monks' Ex'r*, 4 Met. 93. It follows that

they were purchasers for value without notice and that the chancellor did not err in refusing the relief asked.

By appropriate pleadings an issue was made as to the ownership of the eight (probably ten) acres excluded from the deed to the Smallwoods. This tract was conveyed by Daniel R. Johnson to the Beaver Creek Fuel Company, which in turn conveyed it to the Elkhorn Gas Coal Mining Company. In support of its title, the Elkhorn Gas Coal Mining Company relies on adverse possession and the establishment many years ago of a division or conditional line between the lands of Harvey Johnson and Eli Johnson, and the subsequent re-establishment of this line more than fifteen years before this suit was brought by Harvey Johnson and Daniel R. Johnson. We deem it unnecessary to discuss the question further than to say that the evidence fully sustains these contentions, and the court did not err in holding that the Elkhorn Gas Coal Mining Company is the owner of the tract in controversy.

Judgment affirmed.

Bevin's Admr. v. C. & O. Railway Co. and Schump.

(Decided February 15, 1921.)

Appeal from Lawrence Circuit Court.

1. Railroads—Crossings—Licensees—Personal Injuries.—One who sits or prostrates himself upon a railroad track, though it be at a public crossing or other place where persons are licensed to use the track, is in no better position than a mere trespasser; and in such case the servants of the railroad company in charge of and operating a train are only required to use ordinary care, after discovering his peril, to protect him from injury.
2. Railroads—Personal Injuries—Res Gestae.—The testimony of an attending physician regarding an alleged statement by a person injured by a train, explanatory of the manner of receiving his injuries, made more than a hour after they were received and shortly before his death, was not admissible as a part of the res gestae or otherwise competent.
3. Railroads—Action for Death—Evidence—Instructions.—Where in an action by the administrator of a decedent against a railroad company to recover damages for his death, the evidence was wholly to the effect and uncontradicted that when run over by the tender of one of its engines he was lying on the railroad track shortly after 1 o'clock of an unusually dark night; that the engine in charge of the engineer was slowly backing the tender at a speed

of between two and four miles an hour, the engine bell constantly ringing, the fireman with a lantern in his hand sitting on the end of the backing tender and keeping a constant look out ahead of it; and that the decedent on the track was not discovered by him until the tender reached him and too late to prevent it from running over him: Held, that such evidence authorized the peremptory instruction that was given by the trial court, directing a verdict for the defendant.

JOHN W. WOODS and ARTHUR T. BRYSON and A. O. CARTER
for appellant.

M. C. KIRK, F. T. D. WALLACE, KIRK & KIRK and WORTHINGTON, COCHRAN, BROWNING & REED for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

About 1 o'clock a. m., October 30, 1916, on a public railroad crossing in the east end of the city of Catlettsburg, George W. Bevins was run over and injured by the tender of an engine belonging to the appellee, Chesapeake & Ohio Railway Company and operated by its servants. Bevins died from the injuries sustained in the accident an hour or two after they were received. Thereafter this action was brought against the appellee railway company and the appellee, Floyd Schump, the locomotive engineer in charge of the engine at the time of the accident, by the administrator of the decedent's estate seeking the recovery of damages for the latter's death, alleging that it was caused by the joint and concurring negligence of the appellees. The latter by joint and separate answer denied the negligence charged to them and alleged that in the matter of receiving the injuries which caused his death the appellant's decedent was himself guilty of negligence which so contributed to his injuries and death, that but for same he would not have been injured or killed. The latter plea was controverted by reply and upon the issues thus made the case went to trial, which resulted in a verdict in favor of appellees, returned by the jury in obedience to a peremptory instruction from the court directing them to so find. The appellant was refused a new trial, complaining of which and of the judgment entered upon the verdict he has appealed.

The facts appearing from the evidence were as follows: appellee's railroad runs in an easterly and westerly direction at the crossing where the accident occurred and where it crosses the street or highway there are two tracks, one a main track, the other a switch. The train

of which the engine and tender by which Bevins was killed were a part, was an east bound freight, running from Ashland by way of Catlettsburg up the Big Sandy River Branch. Just prior to the accident the train had been brought to a stop near the crossing. The engine and tender were then uncoupled and moved on to the side track to take up several cars thereon to be attached to the train. The engine and tender in backing on the side track and over the crossing there struck and ran over the decedent, causing the injuries of which he died. The engine and tender were at the time moving at a speed of between two and four miles an hour, and the engine bell all the time ringing. The engineer and a brakeman were aboard, the former in the cab of the engine, and the latter on the rear of the tender with a lantern in his hand maintaining a constant lookout in front of the backing tender, as was the engineer from his position. The decedent was lying prostrate on the crossing and across the side track; why he had thus placed himself, whether from intoxication or some other cause, was wholly unexplained. It, however, appears that it was a very dark night and the atmosphere foggy. The brakeman testified that he did not see the decedent until the tender practically reached the crossing and was upon him and could not sooner have seen him. He then discovered a dark object on the track and at once signaled the engineer to stop, which the latter immediately obeyed, but the stop could not be effected until the tender ran upon the decedent's body. At the conclusion of the appellant's evidence the trial court gave the instruction directing a verdict for appellees. This action of the court was inevitable, as the facts related above furnished by the evidence of the engineer and brakeman were uncontradicted. It is true there was an attempt to prove by the physician who attended the decedent after the accident, that the later said he was standing and not lying on the side track when struck, waiting for a train to pass on the main track. But as this statement was made at a place removed from that of the accident and more than an hour after the accident, it could not be regarded as a part of the *res gestae* and was incompetent for any purpose whatever. Mathews' Admr. v. L. & N. R. R. Co., 130 Ky. 551.

It will readily be seen that the evidence was all one way and all to the effect that the injuries to and death of the decedent could not have been prevented by any kind of precaution or care on the part of the engineer or brake-

man, and that they were wholly due to his own negligence. In the following cases we held that one who sits or prostrates himself upon a railroad track, though it be a place where persons are licensed to use the track, is in no better position than a mere trespasser; and in such case the servants of a railroad company in charge of a train are only required to use ordinary care to protect him from injury, after discovering his peril. *Louisville and Nashville R. Co. v. Smith's Admr.*, 216 S. W. 1063; *C. N. O. & T. P. R. Co. v. Mayfield's Admr.*, 145 Ky. 395, 140 S. W. 310; *Cornett's Admr. v. L. & N. R. Co.*, 181 Ky. 132, 203 S. W. 1054; *Lyons, Admr. v. I. C. R. R. Co.*, 59 S. W. 507, 22 Ky. Law Rep. 1032; *L. & N. R. R. Co. v. Bay's Admr.*, 142 Ky. 407, 134 S. W. 450, 34 L. R. A. (N. S.) 678.

As no cause whatever is shown for disturbing the verdict, the judgment is affirmed.

Inland Navigation Company, et al. v. American Surety Company of New York.

(Decided February 15, 1921.)

Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. Principal and Surety—Nature and Extent of Liability of Surety.—The surety is not bound if the obligee violates the terms of the suretyship.
2. Principal and Surety—Contract of Surety Company.—While a contract of a surety company for pay is not construed as strictly in favor of the surety as a voluntary contract of like nature, nevertheless the surety will not be bound if the obligee in the bond breach its material terms.
3. Principal and Surety—Discharge of Surety.—Where the contract of suretyship required the obligee in the bond to retain a certain per centum of the contract price of a boat to be built until the vessel was inspected and accepted after notice to the surety and the obligee violated this part of the agreement and paid the full contract price to the builder, the surety is relieved of liability on the bond.

DUFFIN, VANCE & DUFFIN for appellants.

FAIRLEIGH & FAIRLEIGH and W. PRATT DALE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON.—Affirming.

The Inland Navigation Company, etc., entered into a contract with the Howard Shipyards Company in 1915, whereby the shipyard company agreed and undertook for a named consideration to build and launch for the navigation company a boat or barge of certain dimensions and character. The shipyards company agreed to and did execute a bond in the sum of \$35,000.00 to the navigation company, conditioned for the faithful performance of the contract to build and launch the boat, and the appellee, American Surety Co., of New York, became and is the surety on the bond.

Among the terms of the contract to build the boat are the following:

“Immediately upon the acceptance of this proposal, there shall be due and payable the sum of ten thousand dollars (\$10,000.00) on account, the balance of the contract price, plus extra orders to be paid as follows:

Five thousand dollars (\$5,000.00) upon the arrival of all the steel needed in the construction of this barge at the shipyard of the builder; five thousand dollars (\$5,000.00) upon riveting of the hull after the hull is generally erected, and five thousand dollars (\$5,000.00) after the successful launching. The balance to be paid after the *inspection by the owner or his agents*, which inspection is to be made upon written notice from the builder that the hull is complete and ready for inspection.

“The builder is to furnish a satisfactory bond to cover this contract, to the owner.”

The guaranty bond contains the following provisions:

“First: That in the event of any default on the part of the principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety, by registered mail, at its office in the city of Louisville, Kentucky, promptly, and in any event within ten (10) days after the obligee or his representative, or the architect, if any, shall learn of such default; that the surety shall have the right within thirty (30) days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract; shall also be subrogated to all of the rights of the principal; any or all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the obligee may then or thereafter have against the surety, and the surplus, if any, applied as the surety may direct.

"Fourth: That the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed; and shall also retain that portion, if any, which such contract specifies the obligee shall or may retain of the value of all the work performed or materials furnished in the prosecution of such contract, until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed."

It is alleged in the petition that the navigation company paid to the shipyard company, pursuant to the contract, prior to April 5th, 1916, the sum of \$10,000.00, \$5,000.00, \$5,000.00 and \$5,000.00, or a total of \$25,000.00, on the original contract price of the barge, and the additional sum of \$2,500.00 on extras; that the shipyard company failed to complete the hull of the barge, or deliver it until April 5th, 1916, a wrongful delay of seven months; that by reason of the wrongful delay the navigation company has been damaged at the rate of \$5,000.00 per month or a total on this item of \$35,000.00; that on April 5th, 1916, the navigation company made demand of the shipyard company for the delivery of the barge but the shipyard company declined to deliver the same until its claim for the balance of cost of construction of the boat, \$28,371.13, was paid to it.

Thereupon the two said concerns entered into the following writing:

"That the Howard Shipyards Company, of Jeffersonville, Indiana, is asserting that in the matter of the construction of the barge 'Inco. No. 1,' there is a balance due it from the Inland Navigation Company, of St. Louis, Missouri, of twenty-eight thousand three hundred seventy-one and 13-100 dollars (\$28,371.13), as of April 1, 1916. This does not include cash advanced, materials furnished and labor performed during March and April, 1916, in all respects.

"The Inland Navigation Company denying that it is so indebted, in the premises, the said Inland Navigation Company has this day paid to the Howard Shipyard Company, and the said Howard Shipyard Company does acknowledge receipt of same from said Inland Navigation Company the aforesaid sum. And the said Howard Shipyard Company has delivered possession of said barge to said Inland Navigation Company, the receipt of

which is hereby acknowledged by said Inland Navigation Company.

"This writing is executed and delivered in duplicate, at Jeffersonville, Indiana, this April 5, 1916, one copy for each of the parties hereto."

These writings were all made a part of the petition, to which the defendant, now appellee, surety company, demurred, and its demurrer was sustained to the petition, as twice amended. The navigation company declining to plead further its action was dismissed as to the guaranty company, and it appeals to this court.

If the surety company is liable at all it is because of the bonding contract copied above, and not otherwise.

In an action on a bond written by a surety company for a premium, if the bond is susceptible of two constructions, the one most favorable to the obligee will be adopted, and such a surety will not be released from liability where the departure or alteration in the contract is not shown to be a material one, but this latter rule does not apply to voluntary and gratuitous sureties.

"In this day and age of corporate sureties, the burden is lightened by the payment of adequate premiums, and their final liabilities are oftentimes secured by counter indemnity. As a result of this new condition of affairs the trend of all modern decisions, federal and state, in the construction of the law appertaining to sureties is to distinguish between individual and corporate suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails as it always has, that is, the contract of an individual surety, or a 'voluntary surety,' as he is spoken of in some cases, will be strictly construed and all doubts and technicalities resolved in favor of the surety, such person being regarded as a favorite of the law. But in the other case, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect." 21 R. C. L., p. 1160; 32 Cyc. 306-7.

By the terms of the bond and contract, the fulfillment of which is guaranteed, it was the duty of the navigation company to retain a certain part of the cost of the construction and launching of the boat until inspected and

found satisfactory by the owner after due notice to the surety company. After the payment of the \$27,500.00 provided for in the contract, the shipyard company claimed a balance due it of \$28,371.13, and refused to deliver the barge until that sum was paid and on April 5, 1916, without notice to the surety, in order to facilitate the delivery of the boat which was urgent, this sum was paid to the builder.

Because of the payment of the entire balance the surety company claims its discharge from liability, for it says this was a material and substantial violation of the terms of both the contract and bond. On the other hand the navigation company insists that the payment was made partly to minimize the damages which were accruing daily, on account of the failure to deliver the boat, at the rate of \$5,000.00 per month, and since this was a benefit and not a detriment to the surety company it cannot complain.

The surety company, only guaranteed the performance of the contract to complete the boat, on certain conditions. It was not liable for a breach of the contract if the obligee in the bond failed to keep faith with the surety. The rule is well settled in this jurisdiction that a surety, even for pay, is not bound if the principal obligee failed to comply with the material and substantial provisions of the contract, the faithful performance of which is guaranteed.

This is the generally accepted rule throughout the country, though there are a few exceptions:

"It is fundamental that any agreement or dealing between the creditor and the principal in an obligation of debt, which essentially varies the terms of the contract, without the consent of the surety, will release the surety from liability. . . . When his contract is changed without his knowledge or authority, it becomes a new contract and is invalid, because it is deficient in the essential element of consent. And it has been held that it is not of any consequence that the alteration of the contract is trivial, or even that it is clearly for the advantage of the surety, if it appears that it varied his responsibility, and was without consent. It is the surety's right to determine for himself what is, or is not, for his benefit. . . . Many decisions stating the general rule employ the word 'material' and hold that any material change in the contract made by the principal parties to it, without the assent of the surety, discharges the latter.

. . . It is a general principle that any material alteration in a building contract will release non-consenting sureties given to guarantee the faithful performance of the contract, and to protect the owner against any claims or liens for labor or materials used in the construction of the building. . . . So generally the courts declare broadly that the owner's failure to retain, until completion of the building, a specified percentage of the price of labor and material, as required by the contract, discharges the surety absolutely, and not merely to the extent of the premature payment. 21 R. C. L., pp. 1004, 1007 and 1013; see also 32 Cyc. 174."

This court in the case of the Champion Ice Mfg., etc. Co., v. American Bonding and Trust Co., 115 Ky. 863, held a contract of suretyship for compensation, similar to the one under consideration a contract of insurance which should be construed strictly against the guarantor or insurer.

In the recent case of Pond Creek Coal Co. v. Citizens Trust and Guaranty Co., 170 Ky. 601, we held:

"A surety has the right to insist on a strict performance of the contract which he secures, and although this rule may not apply with the same strictness to a paid surety as it does a voluntary one, the paid surety will be released unless there has been a substantial performance of his contract by the one secured.

"The general rule is the party secured or guaranteed must exercise the utmost good faith in all of his dealings with the principal obligor and strictly comply with the terms of the contract secured, and any failure on his part to do this will result in the release of the surety. This general rule is stated in Brandt on Suretyship and Guaranty (third edition), vol. 1, section 106.

"It is well settled and undisputed law that a surety is only bound by the terms of his contract; and that if the creditor does any act which, in contemplation of law, alters the surety's liability, increases his risk, or deprives him, even for a moment, of the right to pay the debt and assume the position of creditor, or of his right to seek indemnity, the surety is thereby discharged, and the fact that the surety may not have been actually injured is immaterial. See also Commonwealth v. Bacon, 33 Ky. Law Rep. 935; Graziani v. Commonwealth, 30 Ky. Law Rep. 119; Sneed's Exor. v. White, 3 J. J. Mar. 526; Illinois Surety Co. v. Garrard Hotel Co. (Ky.), 118 S. W. 967;

Elsey v. Peoples Bank of Bardwell, 166 Ky. 386." See also Vaumeter v. Corcoran, 11 Ky. Opin. 15.

The payment of the balance, \$28,371.13 by the owner to the builder, without notice to the surety company, even under protest, was a material violation of the terms of the contract, for it took away from the surety company the fund which it had the right to expect to be applied to the payment of any loss sustained by the navigation company, if any, or to the fulfillment of the contract according to its terms, if the contract had not been fulfilled. This was such a disregard of the rights of the surety as worked a release of it from further obligation.

Counsel for appellant frankly admit in the outset of their argument, that if this court is to adhere to the rule announced in the case of the Pond Creek Coal Co. v. Citizens Trust & Guaranty Co., *supra*, the judgment in this case must be affirmed. We believe that opinion sustained by the great weight of authority in this country and see no reason to recede from the principles there announced, and we do not.

Judgment affirmed.

Berry v. Hale, Sr.

(Decided February 15, 1921.)

Appeal from Fulton Circuit Court.

Forcible Entry and Detainer—Evidence.—Evidence examined and held to show a tenancy from month to month and as the tenant refused to surrender possession at the end of the month, forcible detainer proceedings were maintainable.

R. B. FLATT for appellant.

ADAMS & STEMBRIDGE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

In this forcible detainer case the weight of the evidence shows that Hale rented the store house and flat above to Berry in 1917, the beginning of the tenancy, for \$40.00 per month, by the month, and not by the year. It was therefore a tenancy from month to month and either party was entitled to terminate the relation of landlord and tenant at the end of any month.

The evidence further shows that Hale, the lessor, gave Berry, the tenant, thirty days' written notice to quit, and that Berry failed to do so, whereupon this writ of forcible detainer was sued out before the judge of the Fulton quarterly court. A trial before a jury resulted in a verdict finding Berry guilty of forcible detainer. The defendant traversed the inquisition and obtained a trial in the Fulton circuit court where a like verdict was returned by the jury and he appeals to this court.

The writ was sued out May 1, 1919. On the trial only one question was made was the tenancy one by the year or by the month? It was a question of fact. The jury was the sole judge thereof. The instructions very clearly submitted the question to the jury, and, as already observed, the weight of the evidence sustains the verdict.

No error is pointed out in brief of counsel and none appears in the record.

Judgment affirmed.

Hartig v. Schrader.

(Decided February 15, 1921.)

Appeal from Jefferson Circuit Court (Common Pleas Branch, Fourth Division).

1. **Brokers—Employment and Authority.**—Where an owner puts in the hands of a broker real estate and fixes the compensation of the broker in the event of a sale, and the broker makes repeated efforts to effect a sale but fails, and thereafter the property is withdrawn from the market and the contract between the parties terminated, but subsequently the same broker notifies the owner that he then has a purchaser for the property at the price fixed in the old contract if the terms are satisfactory, and the owner answers fixing the price and terms, the property is again placed in the agent's hands with authority to seek a purchaser.
2. **Brokers—Employment and Authority—Commissions.**—Where property is placed in the hands of a broker with authority to seek a purchaser upon stated terms, and he finds such purchaser who is ready, willing and able to comply with the terms, he has earned his commission; but there being no definite contract for the amount of his compensation, the law will imply a contract to pay him the value of his services.
3. **Brokers—Actions for Compensation—Quantum Meruit.**—In an action on a quantum meruit for services rendered it is not necessary to allege a promise to pay but only to set up the facts from which the law will imply the promise.

4. Brokers--Employment and Authority.—The owner of property who has placed same in the hands of a broker but not by a contract of exclusive agency, retains the right to sell the same himself at any time before receiving notice that such agent has found a purchaser ready, willing and able to buy upon the terms named; but the sale contemplated in this rule is either the execution and delivery of a conveyance or the entering into of a binding, written contract which may be enforced.
5. Brokers—Compensation—Sale by Owner.—A sale by the owner which will deprive the broker of compensation, must be a completed, valid sale, or an enforceable written contract, consummated before having notice that the broker has a purchaser, and the owner can not so deprive him by merely entering into an oral or other unenforceable agreement to sell the property.
6. Brokers—Compensation.—If the owner receives notice that the broker has found a purchaser after he has verbally agreed with another purchaser to sell and convey him the property, but before he has executed and delivered such conveyance or entered into any binding, written contract, the broker is entitled to compensation.

DODD & DODD and TYLER BARNETT for appellant.

BINGHAM, PETER, TABB & LEVI for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

On and prior to August 7, 1914, appellant, Charlotte Hartig, was the owner of certain real estate at Third and Walnut Streets in Louisville. On that day, through her agent, Wuesthoff, she placed same in the hands of appellee, Schrader, for sale at the price of \$36,000, fixing his commission at \$1,000 if he effected the sale.

Schrader, after several futile efforts, was unable to bring about a sale, and in 1915 the property was withdrawn from the market and the agreement between the parties terminated.

Prior to this, and in 1904, Mrs. Hartig executed to Wuesthoff, of Milwaukee, a full and complete power of attorney authorizing him to mortgage and control her said property and to sell and convey the same and execute deeds therefor, which power of attorney is of record in Jefferson county.

In this situation on June 6, 1916, Schrader sent the following letter to Wuesthoff at Milwaukee:

"I have party now that would consider the Third and Walnut Street property at \$36,000 providing easy terms covering six years would be considered by you. Let me know the least cash payment you would exact—with the

annual payments and least interest charges and I will put it up to them."

On June 8th Wuesthoff sent to Schrader the following answer to that letter:

"In reply to your inquiry I wish to state that I would make the following terms:

"\$11,000 cash; \$25,000 mortgage at 5 per cent., of which \$5,000 would be payable in two years and \$20,000 in six years from date of sale."

Then on the afternoon of June 12th Schrader sent the following telegram to Wuesthoff:

"The price and terms of your letter of eighth is accepted. Letter confirming same will follow."

This telegram was received by Wuesthoff between two and three o'clock of the afternoon of that day; and shortly thereafter Wuesthoff, before three o'clock of that afternoon, sent to Schrader the following telegram:

"Sorry; have sold the property here this morning."

The undisputed evidence is that on the morning of June 12th Wuesthoff, acting as agent for Mrs. Hartig, had orally agreed with another party in Milwaukee to sell and convey the property at Third and Walnut but made no conveyance nor entered into any written contract therefor, but did, in compliance with his oral agreement on the following morning, June 13, 1916, complete the sale and convey the property to such other purchaser.

This is an action by Schrader, a licensed real estate agent, against Mrs. Hartig on a *quantum meruit* for the value of his services rendered under the agreement of June, 1916, and the court, at the conclusion of all the evidence, gave the jury a peremptory instruction to find for the plaintiff the value of his services, about which there was no contrariety of evidence.

It is the contention of appellant that the letter of Schrader and the answer thereto of Wuesthoff established no contract relations between the parties and consequently did not authorize Schrader to seek a purchaser or sell the property and there could therefore be no implied promise to pay for his services. The argument is that the letter of Schrader was a mere inquiry as to the price of the property and the terms that would be acceptable, and that the answer of Wuesthoff was only a response giving the price and the terms, and in no sense may be construed as authorizing Schrader to seek a purchaser on those terms.

But in the light of the former contract relations between these same parties with reference to this same property, such interpretation can not be given to these letters. When we consider that this property had formerly been placed in Schrader's hands for sale; that his compensation in the event of a sale had been definitely fixed, and that he had made repeated efforts to effect a sale but had failed, and that the owner had thereafter withdrawn the property from the market and terminated the contractual relations between them; and that Schrader had notified her agent that he now had a purchaser who would consider buying the property at the price fixed in the old contract if the terms of payment and the interest on deferred payments were satisfactory, and such agent answered fixing the price and terms, it is evident that it was contemplated on both sides that the property was again placed in Schrader's hands with authority to seek a purchaser upon the terms named.

To give any other effect to them would be to ignore the conceded fact that Wuesthoff knew Schrader was in the real estate business; that he knew of his former efforts to sell this property and that he knew under the former contract he had expected compensation therefor, and so knowing these facts and knowing from the letter of June sixth that Schrader had a prospective purchaser, it must have been in his mind that Schrader would again undertake to sell the property upon the terms named, and that when he did he would expect a reasonable compensation for his services.

That Wuesthoff himself gave that interpretation to these letters is apparent in his letter of June 14th to Schrader wherein, after telling Schrader that he could not recognize the sale made by him, he further says:

"When I gave you the terms upon which I was willing to sell, I did not give you any exclusive right nor any time option. I naturally reserved the right to dispose of the property myself if any opportunity presented itself."

From this it will be seen that simultaneously with these transactions Wuesthoff only claimed that he had not given Schrader an exclusive right to sell the property, but there was no claim that he had not given him authority to look for a purchaser.

Therefore, from this correspondence and the circumstances surrounding the parties, it must be held that Schrader was authorized to seek a purchaser; but having no definite contract for the amount of his compensation,

must be relegated to an implied promise to pay him the value thereof.

It is said, however, that there is no promise alleged in the petition to pay for these services and that therefore there can be no recovery.

As stated this is an action on a *quantum meruit* and seeks the value of plaintiff's services upon an implied contract; and in such actions where the law implies a promise to pay for services rendered it is not necessary to allege a promise to pay, but only to set up the facts from which the law will imply the promise; Newman's Pleading, sections 319, 551D; Elliott on Contracts, sec. 1358.

Finally it is argued by appellant that as the letters between Schrader and Wuesthoff certainly created no exclusive agency in Schrader, appellant had the right at any time before Schrader effected a sale to sell the property to any purchaser which Schrader had not produced or induced to become interested in the property, and that therefore Wuesthoff's oral sale on the morning of June 12th before he had notice from Schrader that his purchaser had accepted the terms, was in the full exercise of his rights in the premises, and being made before such notice, there is no liability to Schrader for a commission.

Undeniably the rule is that an owner of property who has placed it in the hands of a real estate agent but not by a contract of exclusive agency, retains the right to sell the same himself before such agent shall have produced a purchaser ready, willing and able to buy same upon the terms named; in fact it has been held in many places that even an exclusive agency does not deprive the owner of this right, but will be interpreted to mean only that the owner will not place the property in the hands of any other agent.

But it is conceded here that there was no exclusive agency and the question is, had Wuesthoff, before receiving Schrader's telegram of June 12th, made a sale of that property to another within the meaning of the rule of law that an owner who has not created an exclusive agency may sell his property before the real estate agent has notified him that he has a purchaser ready, willing and able to take the property upon the terms fixed? In other words, had Wuesthoff completed a sale, or entered into such obligations as bound him or his principal to make

the conveyance of this property, before he received Schrader's telegram?

The sale of land in this state means either the execution and delivery of a conveyance therefor in the manner prescribed by statute, or entering into a binding, written contract which may be enforced in the courts. Under our statute of frauds the mere oral agreement of parties, one to buy and the other to sell real estate upon certain terms, is of no binding force whatsoever upon the seller; the law prescribes the manner in which he may be divested of the title to real estate, and it likewise provides that his oral engagements as to same shall have no binding force.

The oral agreement between Wuesthoff and the Milwaukee purchaser in no sense bound either Wuesthoff or his principal to convey the property to that purchaser, and before such conveyance was made Wuesthoff confessedly had notice that Schrader had a purchaser who had accepted the terms in his letter; and not being bound to the proposed Milwaukee purchaser, could he, by complying with the terms of his oral agreement after having notice of Schrader's purchaser, deprive Schrader of his right to commissions?

Manifestly neither Wuesthoff nor his principal was legally bound either to make the conveyance to the Milwaukee man or suffer in damages if they declined to do so, and assuming that they understood this, they apparently consummated the agreement with the Milwaukee purchaser in recognition of the fact that they must thereafter account to Schrader for his commission.

That a sale by the owner of real estate who has placed same in the hands of a broker must be a completed, valid sale, consummated before having notice that the broker has a purchaser, so as to defeat the right of the broker to commissions, seems to be the recognized rule and is fully in accord with reason and justice.

If an owner might defeat his broker in the collection of commissions by merely entering into an oral agreement with another to sell his property, which agreement was in no sense enforceable against him, an easy method of escaping such payment would be afforded.

The case of *York v. Nash*, 42 Oregon 321, was an action by a real estate broker for his commissions. Among other defenses it was claimed that, before the defendant had notice of the purchaser procured by the plaintiff, he had sold the property to another. It developed, however,

that he had only given an exclusive option on the property, and the court in disposing of this defense said:

"If, after the broker has found the purchaser, the owner sells to another person, without knowledge thereof, the broker is not entitled to his commission; *Darrow v. Harlow*, 21 Wis. 306 (94 Am Dec. 541); *Baars v. Hyland*, 65 Minn. 150 (67 N. W. 1148); *Gunn v. Bank of California*, 99 Cal. 349 (33 Pac. 1105,; *Wylie v. Marine National Bank*, 61 N. Y. 415. This doctrine, however, can not be invoked as a defense to this action, because defendant had not sold or made a valid contract to sell prior to the time the purchaser secured by the plaintiff was introduced to him and expressed not only his willingness but his anxiety to take the property. The arrangement between the defendant and Lane would not constitute a sale, within the meaning of the rule stated, nor operate as a revocation of the plaintiff's authority. It was a mere verbal understanding, without any consideration, and had none of the elements of a sale or of a contract for a sale."

In *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, a defense somewhat similar to that interposed here was relied upon, and the court, after finding that no binding contract had been concluded by the owners before they were informed by their broker that he had found a purchaser, said:

"The right of the principal to sell his own property at any time prior to any sale to be made by an agent where no exclusive authority is given to the broker, and no time is fixed within which he shall have the absolute right to operate, is tolerably well settled by the authorities. The same cases, however, hold that wherever the broker is authorized to sell and he finds a purchaser before any sale is completed by the principal, the latter must account for the promised commissions unless there be something in the contract which relieves him from liability. *Wray v. Carpenter*, 16 Colo. 271."

See also *Wright v. Waite*, 126 Minn. 115, and note to *Bluthenthal v. Bridges*, 24 L. R. A. (N. S.) 279.

Manifestly the owner can not by a mere oral engagement to sell his real estate which is not binding upon him, defeat his broker in the collection of his commissions where the broker has complied with his undertaking and notified the owner before the latter has in compliance

with his oral engagement conveyed the property to another.

Judgment affirmed. Whole court (except Judge Clarke) sitting.

Hays, et al. v. Jenkins.

(Decided February 15, 1921.)

Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. Appeal and Error—Transcripts.—A party who obtains an appeal from the circuit court to the Court of Appeals, must file a transcript of the record, in the clerk's office of the latter court, twenty days before the second term of the latter court, thereafter, or obtain an extension of time in which to do so, as provided by section 738, Civil Code.
2. Appeal and Error—Transcripts.—After the time has expired, within which an appellant, who has been granted an appeal by the circuit court, may perfect his appeal by filing a transcript of the record in the office of the clerk of the Court of Appeals, the latter court can not grant an extension of time, within which to file the transcript, as there is then no time to extend.
3. Appeal and Error—Transcripts.—Where an appellant has in good faith, in due time, filed such a transcript of the record in the Court of Appeals, as he deems necessary for adjudication of his appeal, and the record is defective because of oversight of the clerk, who makes the transcript or inadvertence of counsel, or loss of a paper or other sufficient reason, he will be permitted to file a supplementary record, for the purpose of making a complete record, after the time has expired within which the original transcript was required to be filed, if offer is made before submission.
4. Appeal and Error—Transcripts.—If for any reason an appellant can not file the transcript of the record, in the office of the clerk of the Court of Appeals, within the time allowed by section 738, Civil Code, he should apply for an extension of the time, before it has expired.
5. Appeal and Error—Transcripts.—An offer to file a transcript of the record, in the court of appeals, in the attempted perfection of an appeal granted by the circuit court, after the expiration of the time allowed by section 738, Civil Code, and after the extension of time, if any has been made, by authority of that section, has expired, will not prevent the dismissal of the appeal granted in the circuit court, where the appellee has made a motion to that effect.
6. Appeal and Error—Transcripts—Dismissal.—The dismissal of an appeal granted by the circuit court, for failure to file a transcript

of the record, in the Court of Appeals within the time allowed by section 738, Civil Code, will not prevent the party from obtaining an appeal from the clerk of the Court of Appeals, within two years from the rendition of the judgment.

BEN. CHAPEZE and JOHN B. BRACHEY for appellants.

J. L. RICHARDSON and W. G. DEARING for appellee.

OPINION OF THE COURT, BY CHIEF JUSTICE HURT—
Dismissing appeal granted by the circuit court, with damages and overruling motion to file transcript, upon appeal granted by circuit court.

On the 22nd day of November, 1919, the appellee, Jenkins, recovered a judgment for money which he was entitled to enforce by execution of *feri facias*, in the Jefferson circuit court, chancery branch, second division, against the appellant, Dawson. On the 26th day of December, 1919, Dawson prayed and was granted an appeal, from the judgment, to this court. The appeal was prayed and granted in the circuit court. He never perfected his appeal by filing in the clerk's office of this court a transcript of the record twenty days before the second term of this court next after the granting of the appeal as provided by section 738, Civil Code, nor did he secure an extension of time for so doing as he might have done for cause shown, nor did he seek such an extension of time, although on the 26th day of December, 1919, the day upon which his appeal was granted, he superseded the judgment by executing before the clerk of the circuit court a supersedeas bond, etc. On the 3rd day of January, 1921, after the time had expired within which Dawson could have perfected his appeal, in this court, by filing a transcript of the record in the clerk's office of this court the appellee, Jenkins, after notice to Dawson, of his intention, filed a copy of the judgment and order granting the appeal, and supersedeas bond, in the clerk's office of this court, and entered a motion for an order, dismissing the appeal and for damages upon the bond. Dawson responded to the motion, by offering to file a transcript of the record, so as to perfect the appeal granted by the court below, and as an excuse for his failure to file the transcript within the time provided by section 738, *supra*, averred that certain depositions in the action had been misplaced, and that he could not sooner secure a copy of the complete record. The provisions of section 740, Civil

Code, seem to be mandatory, and it provides, "and if he fail to file the transcript within the time allowed by section 738, or by the court pursuant thereto, his appeal shall be dismissed." *Langhorne v. Wiley*, 120 Ky. 511; *Ewing v. Stanley*, 119 Ky. 629; *Hernstein v. Depue*, 23 R. 1498. The dismissal must follow in such case, although the reasons given for a failure to file the transcript within the time provided by section 738, are such, that, the court, if applied to as authorized by that section, would have granted an extension of time. To permit the filing of a transcript after the expiration of the time allowed, would be equivalent to now granting an extension of time, which we are not authorized to do. An extension of time can not be granted unless application is made, before the expiration of the time for filing the transcript, as provided by section 738, *supra*, *Hernstein v. Depue*, *supra*, *Howe Bldg. Assn. v. Bruner*, 134 Ky. 364. When the time has expired, there is nothing for the court to extend. We have often held, that, if for any reason, the appellant can not file the transcript within the time fixed by section 738, *supra*, he should before the expiration of the time, apply to this court for an extension of the time. *Williamson v. Maynard*, 135 Ky. 29; *Willis v. Whitt*, 124 S. W. 362; *Edelston v. Edelston*, 173 Ky. 252. The case of *Bush v. Lisle*, 86 Ky. 504, relied upon by *Dawson*, has no reference to a state of case, such as exists here. In that case, the appellant had in due time, in good faith, filed in the clerk's office of this court a transcript of all the record, which was in existence, and it was held, that when an appellant, within the time allowed, in good faith, filed the transcript, and because of oversight or inadvertence, of the clerk or counsel, the loss of a paper or other sufficient reason, the transcript was defective and did not contain all of the record intended to be filed, the appellant might before submission of the action, in this court and after time had expired for filing the transcript, file the supplemental record necessary to make a complete record. The cited case as well as others holding similarly have no application, where a transcript of no part of the record was filed within the time allowed.

The dismissal of the appeal granted by the circuit court because of failure to file the transcript within the time allowed, however, does not prevent a party from praying and being granted an appeal by the clerk of this court, if sought within two years from the rendition of

the judgment. Section 745, Civil Code; Wearen v. Smith, 80 Ky. 217; Wright v. Woolfork, 14 Bush 311.

In addition to the express direction of section 738, Civil Code, the adjudications of this court, thereon, have been to the effect, that a failure to file the transcript within the time allowed by the Code provision, or within the extension of time, granted by the court under the authority of that provision, is a ground for a dismissal of the appeal. The motion of appellee to dismiss the appeal granted to appellant, in the circuit court, is therefore sustained, and damages awarded on the supersedeas bond, and the motion of appellant Dawson, to now file the transcript in this court, in attempted perfection of the appeal granted below is overruled.

Townsend & Freeman Company v. Tabor.

(Decided February 18, 1921.)

Appeal from Breckinridge Circuit Court.

1. **Contracts—Inconsistent Contracts—Instructions.**—On a trial where the issue is whether one party had authority to bind another in the execution of a contract, and there were two contracts offered in evidence on the issue, and under the first he had the authority and under the second he had not, the court should have instructed the jury whether the latter contract terminated the former.
2. **Contracts—Agency.**—If one having large contracts for ties to fulfill, enters into a contract with another wherein he agrees to pay the latter stipulated prices for ties which he puts out in his territory, and the first party is to receive a commission on each tie so furnished and is to supply the second party with the money to carry on his business, the second party is not thereby created the agent of first party so as to bind him in the execution of a contract for the sawing and production of a large number of ties.
3. **Contracts—Inconsistent Contracts—Termination.**—When parties, sustaining at the time contractual relations with reference to a particular subject-matter, again enter into a new contract solely with reference to the same subject-matter, the terms of which are inconsistent with those of the original contract and the legal effect of which is essentially different, the first contract is terminated, although there be no express provision to that effect.
4. **Contracts—Evidence.**—The correspondence between the parties and their actions under the first contract which had been termin-

ated are incompetent evidence upon the issue whether the party had authority under the second contract.

JOHN P. HASWELL, JR., ALLEN R. KINCHELOE, W. S. BALL and W. D. FITZPATRICK for appellant.

HENRY DeHAVEN MOORMAN, D. C. WALLS and ERNEST WOODWARD for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

Appellant, an Indiana corporation, engaged in the buying and selling of certain timber products, especially railroad ties, had contracts for the delivery of ties to the Monon railroad and other parties.

On the 20th of January, 1917, it entered into a contract of partnership with Head, of Breckinridge county, Kentucky, the company agreeing to supply Head with sufficient money to buy and produce ties in his locality, and Head agreeing to devote his entire time to the business of buying and operating, and to keep an accurate account of all purchases, operations and expenses other than his individual expenses, and to render an account to appellant each week, and to send all cash to appellant as soon as received; and the profits were to be shared equally.

Little was accomplished under this contract, only one small tract of timber being bought by Head, and no ties were produced from that until after the contract was terminated.

Both parties were dissatisfied with the contract, as its purpose was not being accomplished, and they sought to enter into a different relationship under which the buying and production of ties might be facilitated.

Therefore, on the third of April, 1917, without expressly abrogating the contract of January 20th, appellant and Head entered into a contract "for handling of ties" wherein the company agreed to pay Head specified prices for certain kinds of ties "which Mr. Head puts out in his territory," and the company was to receive two cents per tie commission and "supply Mr. Head with any reasonable sum of money to carry forward his business." All remittances were to be made to the company and it was in turn to remit to Head after deducting its commissions. The concluding clause in the contract is:

"The above is to be understood as the essence and truth of the business of W. N. Head and the Townsend & Freeman Co."

On the 30th of July, 1917, while the contract of April 3rd was in effect, Head, assuming to act for the Townsend & Freeman Co., contracted with the appellee, Tabor, to saw for the company between that date and the first of January, 1918, 75,000 ties in Breckinridge county at an agreed price, and further agreed, in the name of the company, to furnish logs to Tabor at his mills sufficient to keep them running at full capacity.

This is an action by Tabor against appellant asking for damages for breach of said contract, wherein he alleges he had made arrangements to complete the same and was ready, willing and able to comply with it on his part, but that in August the defendant, wrongfully and in violation of his rights, directed him not to begin the sawing, and refused to furnish the logs, or any of them, for such sawing, whereby he was wrongfully deprived of his profits on the 75,000 ties.

The alleged contract is incorporated in the plaintiff's petition and purports to have been executed by "Townsend & Freeman Co., by W. N. Head."

The defendant answered, denying the execution or delivery of the contract, and denying that the plaintiff could have with his mills and equipment sawed the said timber into 75,000 ties by the first of January, 1918.

During the trial an amended answer was filed, pleading that on the 30th of July when Head assumed to execute the contract in the name of the defendant, it only sustained contractual relations with Head under its contract with him of April 3rd, and that he was not its agent and therefore had no authority to bind defendant in the execution of the Tabor contract.

The evidence on the main issue consisted largely of the two contracts referred to and the correspondence between appellant and Head both before the execution of the April contract and thereafter, and the jury returned a verdict for plaintiff, upon which judgment was entered.

The defendant asked the court to instruct the jury that under the April contract Head was not its agent, but the court declined to do this and merely submitted, without mentioning either of the contracts, the issue whether the jury believed Head was authorized by the defendant

to make the contract sued on; and then in another instruction left to the jury to determine whether the contract of January 20th had been terminated.

Whether the contract of April terminated the January contract was a question of law and should have been disposed of by the court in its instructions; likewise the question, whether Head had authority under the April contract to bind appellant in the execution of the Tabor contract, should have been settled by the court.

The contracts of January and April were exclusively between the same parties and dealt wholly with the same subject-matter. The January contract was a partnership and the purpose for which it was entered into was not being accomplished, and so the parties sought by entering into the April contract, whereby a new plan was adopted, to produce better results.

When parties, sustaining at the time contractual relations with reference to a particular subject-matter, again enter into a new contract solely with reference to the same subject-matter, the terms of which are inconsistent with those of the original contract and the legal effect of which is essentially different, the execution of the second contract will operate as a rescission of the first, although there be no express provision to that effect.

The rule is clearly stated in 6 R. C. L. page 923, as follows:

"Again, a contract need not be rescinded by an express agreement to that effect. If the parties to a contract make a new and independent agreement concerning the same matter, and the terms of the latter are so inconsistent with those of the former that they can not stand together, the latter may be construed to discharge the former. One contract is rescinded by another between the same parties, when the latter is inconsistent with, and renders impossible the performance of, the former, but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together."

See also *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Buffum v. Breed*, 116 Mass. 582.

That the two contracts were inconsistent and their legal effect essentially different, must be admitted. The first was a contract of partnership, while the second was

only a contract whereby Head was to furnish railroad ties to fill certain contracts appellant had, and Head was to receive all the profit made thereon, except a certain commission which appellant was to receive in consideration of furnishing to Head the money with which to operate his business. One constructed a partnership which authorized Head to bind appellant, while the other was merely an agreement by appellant to buy from Head at stipulated prices such ties as he might buy or produce.

Head could not operate in the production and purchase of ties as the partner of appellant and at the same time and in the same territory operate and purchase ties for himself upon which he would get all the profit except a stated commission. As the two contracts were inconsistent and their legal effect widely different, and the latter was in no sense supplementary to or a ratification of the first, the latter terminated the former.

It is apparent Head had no authority under the April contract to bind appellant in the execution of the Tabor contract, and any authority he had must have been given outside of that contract.

The court should, therefore, have instructed the jury that the January contract was terminated by the April contract, and that Head had no authority under the April contract to bind appellant in the Tabor contract, and there should have been submitted to the jury the question whether he had such authority under the oral conversations in evidence.

It follows from what we have said that none of the correspondence between the parties prior to the third of April should be admitted, nor any of their acts under the January contract, including the turning over of certain blanks to Head by appellant; but all the letters and correspondence between the parties, and their acts, between April 3rd and July 30th under the April contract, which have any bearing upon the question of authority, will be competent.

The judgment is reversed, with directions to grant appellant a new trial, and for proceedings consistent herewith.

Gross' Admr. v. Ledford.

(Decided February 18, 1921.)

Appeal from Fleming Circuit Court.

Husband and Wife—Alienating Affections.—An action or cause of action for alienation of the affections of a spouse does not survive the death of the party injured or injuring.

C. W. FULTON and JOHN P. McCARTNEY for appellant.

B. S. GRANNIS and O. R. BRIGHT for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.

This was an action by Chas. C. Gross against the appellee, James Ledford, to recover damages for the alleged alienation of the affections of the wife of Gross, and the consequent desertion of him, whereby he lost the benefits of her affections, society and assistance as a wife, or in other words, was wrongfully deprived by the malicious acts of appellee of his conjugal rights, which are denominated in the phrase of the ancient common law as *consortium*. There was no averment in the petition of any criminal conversation with the wife, and hence it was purely an action for alienating the affections, and the consequent enticement of her away from her husband. After instituting his action, and before the trial or a judgment, Gross died and his administrator, as his personal representative, sought to have the action revived and to prosecute same as such representative. This the circuit court denied, holding that the action did not survive, but abated with the death of the injured husband and dismissed the petition, and from the judgment this appeal is prosecuted by the personal representative, and the only question for decision is whether such an action survives the death of the party who has received the injury upon which it is based, and the answer to this question necessarily depends upon whether or not the cause of action stated in the petition survives the death of the complaining party.

At the common law, whether an action survived the death of one of the parties depended upon the nature of the action and the damages sought, and not upon the form of the remedy, and according to the principles of

the same law all actions and causes of action for injuries to the person, which were founded upon torts, died with the person. *Cowan v. Campbell*, 17 B. M. 522; *Hawkins v. Glass*, 1 Bibb. 46; *Lynn v. Sisk*, 9 B. M. 135. A modification of the doctrine that an action founded upon a tort did not survive, was made by act of the General Assembly in 1797, but this act was held not to extend to or to embrace the right to revive actions for personal injuries. *Kennedy v. McAfee's Extr.* 1 Litt. 170. The action for damages for the alienation of the affections of the complainant's wife whether in form of the ancient action of trespass *vi et armis* or in the almost as ancient form of *trespass on the case*, it was an action for a personal injury founded upon a tort, and for damages suffered by the person, and hence according to the common law such a cause of action, as well as such an action pending and undetermined, dies with the injured party, or with the one having done the injury, unless it survives by reason of section 10, Ky. Stats., which was originally enacted in 1812. That statute provides as follows:

"No right of action for personal injury or injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded upon contract."

It will be observed that the statute does not provide that any particular remedy for a personal injury shall survive, but the right or cause of action for a personal injury shall survive, except for injuries which arise from assault, slander, criminal conversation and so much of the cause of action for malicious prosecution as entitled a recovery for injury to the person. The excepted rights of action died with the person injuring or injured and the statute was evidently enacted in contemplation of the common law doctrine that the survival of the cause of action depended upon the nature of the action and the damages sought, and not the form of the remedy. The question involved here does not, of course, have any reference to the various causes of action which are given by statutes to the widows, children and personal repre-

sentatives of persons, who are killed by wrongful or negligent acts, for damages for the deaths of such persons, nor does it have any reference to actions for torts which are founded upon contracts and grow out of the contractual relations between the parties.

Section 10, Ky. Stats., has been construed in several decisions of this court when applied to certain states of facts, but the exact question for decision in this case has not heretofore been determined or considered by this court, and decisions in other jurisdictions, upon the subject of a survival of the cause of action here insisted upon, have been controlled by the particular statutes in force upon the subject in those jurisdictions, and hence are not authorities here, but some assistance may be had by analogy from the previous decisions of this court concerning the statute when applied to other states of fact. In the construction of this statute, the same rules should be controlling as in the construction of any other statute, the chief among which is to give to it the meaning and effect which the legislature intended that it should have. Doubtless with this view, although the statute provides that an action or cause of action for assault only shall not survive, this court has unhesitatingly included in the exception "action for assault" any cause of action for a battery or assault and battery done with the intention to do violence, as well as for assault and the latter term has been treated as if it was assault and battery. *Shields v. Rowland*, 151 Ky. 136; *Anderson v. Arnold*, 79 Ky. 370; *Lewis v. Taylor Coal Co.*, 112 Ky. 845; *Winnegar v. C. P. Ry. Co.*, 85 Ky. 547. The foregoing has been done, although there could be no difficulty in drawing a distinction between an assault and a battery, but, of course, a cause of action for a battery could not exist without including the fact of an assault, and an absurd meaning would have to be given to the statute if it should be held that under its terms a cause of action, for a mere assault, should die with the death of one of the parties, while the cause of action for the battery which followed the assault, should survive. A cause of action for a libel, according to a literal reading of the statute, survives, while a cause of action for slander dies with one of the parties. An essential element constituting the cause of action for libel is that the defamation be written or exhibited by pictures or otherwise published, and language when written may be the basis of an action for libel, when if spoken would

not amount to a slander and the party uttering it would be immune from damages. Spoken words, alone, technically make a basis for an action for slander. Yet, in *Johnson v. Haldeman*, 102 Ky. 163, it was held that an action for libel did not survive, and that it was the legislative intent to except from the operation of the statute, by use of the word slander, the causes of action for injuries to character incurred from the use of any defamatory language, either spoken or written. The gravamen of the cause of action is injury to the reputation, in either libel or slander, and the measure of damages is the same in either action. The opinion in *Huggins v. Toler*, 1 Bush 193, is referred to as holding contrary to the doctrine, as deduced from the above cited cases, in that it was an action for causing an unlawful arrest and imprisonment, and it was held that the cause of action survived. The latter opinion, however, does not militate against the doctrine to be deduced from *Johnson v. Haldeman*, *supra*, although it is true in an action for malicious prosecution, damages may be recovered for wrongful arrest and imprisonment, if such has occurred, the same as in an action for false imprisonment, but in an action for malicious prosecution other damages may, also, be recovered besides those for the personal injury, and the causes of such action survive, while those for injury to reputation and for mental agony, and other personal injuries die. *Huggins v. Toler*, *supra*, was in fact an action upon the case for malicious prosecution and the question before the court for decision was whether the action should be revived, which the court adjudged was proper, but did not thereby decide that all the various elements of damages sought should or could be prosecuted to a recovery.

An action by the husband for damages for the alienation of the affections of his wife is of the same nature and genus as an action for criminal conversation with her, just as an action for assault and an action for a battery are of the same nature, and as an action for libel and one for slander are of the same genus. The actions for alienations of affections and for criminal conversation are so nearly of kin that a plaintiff may embrace and rely upon both in the same petition against a defendant. Civil Code, section 83; *Merritt v. Cravens*, 168 Ky. 155. They are, however, in judicial procedure, two distinct remedies, but the purpose of the prosecution of each is the same

and that is to recover damages for the loss of the affections, society and aid of the wife, the *consortium* of the common law. *Scott v. O'Brien*, 129 Ky. 1; *Kibbie v. Rucker*, 1 A. K. M. 391; 21 Cyc. 1617, 1623; *Merritt v. Cravens*, *supra*. The measure of damages and the only basis upon which damages may be recovered in each action, are the same. They are alike in being actions to recover damages for personal injuries—not physical injuries to the person but injuries suffered by one on account of something having occurred to or with regard to another, and consists of the loss of *consortium*, mental agony and humiliation on that account. As the actions for libel and slander are remedies for one object, and that is reparation for defamation of character, so the actions for alienation of affections and criminal conversation can be maintained for one purpose only, and that is to recover damages for the loss of *consortium* of the spouse. The latter actions are no more unlike in character than actions for libel and slander are unlike each other. The distinction between an action for alienation of affections and an action for criminal conversation is, that to sustain the former it is not necessary to allege or prove any criminal conversation with the spouse, so that it becomes necessary in order to sustain the action that there be evidence that the defendant, by words or acts, with an evil intent, has alienated the affections of the spouse, resulting to the complainant in the loss of his or her society, aid and assistance as a spouse. While to sustain the latter action it is necessary to allege and prove acts of adultery by the spouse and the defendant, and when such is proven, it is sufficient to support the action, as the loss of *consortium*, and the evil intent of the defendant will be presumed. In the action for the alienation of affections, however, although evidence of adulterous conduct of the spouse and the defendant is not necessary to sustain the action, proof of such conduct may be made as evidence, tending to show the alienation of affections and in aggravation of damages. A judgment in one of the actions for damages for loss of *consortium* would bar an action for the same loss in the other action. If it were held that a cause of action for alienation of affections survives the death of the party injuring or injured, although the statute says that a cause of action for criminal conversation shall not survive after the death of one of the parties, an action for alienation of affections could be maintained and proof of

adultery with the spouse could be given in evidence to support the charge of alienation of affections and to aggravate the damages, and thus the statute would be rendered without effect and substantially meaningless. It is difficult to conclude that the legislature intended such an abortive result. Hence, we conclude for the reasons given, that an action for the alienation of the affections of a spouse being of the same character, and the damages and the basis of their recovery the same, as in an action for criminal conversation, and being in reality a lesser injury, the essential facts constituting it being in almost every instance in existence in the latter, the legislature intended by the exception of criminal conversation, to include within it an action for the alienation of the affections.

Judge Newman, in his work upon pleadings, arrives at the conclusion that personal injuries suffered by reason of the violation of relative rights do not survive. Section 174b, of his work, discussing the effect of our statutes relating to the survival of actions, is as follows:

"Although these statutes mention the action crim. con. as one, which dies with the person and omit or fail to mention seduction or any other of the injuries, which may be done to the relative rights of the person, yet as the statute by its terms provides only, that such actions as are for injuries to the person or to real or personal estate, shall survive, an action for seduction, or for enticing away an infant child or servant or apprentice, and all actions for injuries to the relative rights of the person only, it would seem must die with the person." An action for alienation of the affections being of that class of injuries, which occur to the relative rights of the person, according to the view of Mr. Newman would not survive. In this contention, he is supported by the decisions of the courts in several states, which have statutes providing that actions for personal injuries, or words of similar import, shall survive. In those jurisdictions, it has been held, that a personal injury, within the meaning of those statutes, is an injury suffered by the person of one—such as is caused by some physical force—as distinguished from an injury through a violation of a relative right. *Billingsley v. St. Louis, etc. Ry.*, 84 Ark. 617; *Davis v. Nichols*, 54 Ark. 358; *Hey v. Prime*, 197 Mass. 474; *Norton v. Sewall*, 106 Mass. 143; *Lehman v. Farwell*, 95 Wis. 185. While our statute, section 10, *supra*, is

somewhat different in its terms from the statutes in force in the jurisdictions wherein the cases cited occurred, those cases are persuasive of the soundness of the conclusion arrived at in this case, and as demonstrating the reluctance of the courts to depart from the ancient rule, which held that personal actions for torts do not survive, and to confine such as do survive, by reason of the statutes, strictly within the reason and meaning of such statutes.

The judgment is therefore affirmed.

Floyd County v. Allen, et al.

(Decided February 18, 1921.)

Appeal from Floyd Circuit Court.

1. Bridges—Establishment by Public Authorities—Estoppel.—Land owners who sought and permitted the county to erect bridge piers on their property, and suffered the bridge to be so maintained and used by the public for several years, will be estopped to claim the county had no right to erect a bridge at that point.
2. Bridges—Establishment by Public Authorities—Damages.—Where county officials had decided to erect a bridge over a creek at a given point, but at the special instance and request of landowners at a different point on the creek, the bridge was actually erected at a different location, but upon the express condition that the landowners would remove a boom which they operated at said point, the failure on their part to so remove the boom will render the operators of the boom liable for any damages resulting to the bridge caused by the maintenance of the boom.
3. Waters and Water Courses—Easements.—Where a stream in its natural condition is capable of being used to float logs, etc., and has in fact been so used for that purpose, the public has an easement in it and the right to so use it, but not in such a manner as to destroy by neglect the property of those on the banks of the creek.

WM. DINGUS for appellant.

MAY & MAY for appellees Allen and Hatcher.

SMITH & COMBS for appellee Cole & Crane.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

This suit was instituted by Floyd county against T. J. Allen, J. W. Hatcher, J. B. Hatcher, J. C. Cole and Clin-

ton Crane, the latter as Cole & Crane, for damages to a bridge across Beaver Creek, caused by the maintenance on the part of the defendants of a boom in the river at that point.

It was charged the defendants jointly owned and operated the boom without right or authority and that enormous quantities of logs were allowed to congregate in said creek. This caused the water to be diverted from its regular channel and resulted in undermining a pier at one end of the bridge.

The Hatchers and Allen denied the allegations of the petition and in addition thereto alleged they were maintaining said boom under an act of the legislature enacted in April, 1886, since which date they had continuously operated the boom. Further, that the piers were erected on property owned by them, without consent on their part, and the defective construction of the bridge was the direct and proximate cause of the damage. The land on one side of the creek was owned by the Hatchers. Allen owned the land on the other side.

Cole & Crane, in addition to other pleas, alleged they were independent contractors and had no control over the manner in which the logs were caught and had no connection with the boom.

In the reply it is alleged the defendants were desirous of having the bridge located at the point where it was actually constructed, though the county authorities had, in effect, practically decided to erect it at a point higher up the creek, but at the special instance and request of defendants, and upon their promise to remove the boom from its then location, the bridge was erected at the site desired by defendants. It was further alleged that the boom was operated in a careless manner, and as to the end of the bridge on the Hatchers' side of the creek they (the Hatchers) had agreed that the bridge might be so erected; while as to the other, or Allen side, it was alleged the bridge was erected on property belonging to the county.

Upon the trial of the case, after the introduction of testimony for plaintiff, the court directed the jury to find a verdict in defendants' favor. From a judgment entered pursuant to the said peremptory instruction the county has appealed.

It is substantially shown by the record that the boom had been operated at the point where the bridge was constructed for a long period of time, and as to the Hatcher end of the bridge, it was erected on property formerly belonging to the Hatchers. One witness testifies that on the Hatchers' side it was 39 feet from the bridge abutment to the county road; on the Allen side there was a space of some 10 or 12 feet between the road and the abutment.

Whether the abutments of the bridge were erected on the property of Allen and the Hatchers can have no effect upon the rights of the parties to this suit. If it was so erected on their land and the parties sought or permitted this to be done and without objection suffered it to be so used for a number of years they are estopped to come in and now claim the county had no right to build the bridge at this point. This feature may be eliminated from the further consideration of the case.

In the main the testimony adduced by plaintiff supports the allegations of its pleadings; at least two witnesses testify the county authorities had practically decided to erect the bridge at the point where the road formerly crossed the creek, which was some distance from the present location, but at the request and instance of defendants it was not so located. The county was unwilling to erect the bridge as requested by defendants unless they would remove the boom. This defendants promised to do, and relying upon this promise to remove the boom the bridge was so located; nor would this site have been agreed upon in the absence of an assurance the boom would be removed. Furthermore, on April 6, 1914, the county served notice on the defendants calling upon the operators of the boom to remove it at once.

It is not disputed that logs in great number collected around the piers and that one of the piers, to wit: on the left, or the Allen side of the creek, was undermined and tilted to such an extent that it became necessary for the county to replace it by another, and this was done at great expense. This being true we are of the opinion the case presented, as to Allen and the Hatchers, a question for the jury and the court erred in giving the directed verdict. The rule in this state is that where there is evidence tending to sustain the cause of action the case is for the jury and not the court.

As to Cole & Crane the evidence fails to show they had aught to do with the maintenance or operation of the boom, hence we find no cause for disturbing the verdict as to them. As to the Hatchers and Allen a different question is presented.

In the first place, if the Hatchers or Allen, or any one authorized to speak for them, or any of them, did promise or agree with the county or its officials that if the location of the bridge was fixed at the point where it was actually erected they would remove the boom at that point, failure upon their part to so remove the boom would subject them, or such of them as so agreed, to liability to the county to the extent that the continuance and maintenance of the boom thereafter caused or brought about any damage or injury to the bridge or any portion thereof.

In the second place, if it should appear, or the jury should be of the opinion, that there was a failure of proof on the question of the alleged promise, the Hatchers and Allen would nevertheless be liable to plaintiff for any damage or injury to the bridge caused from negligence on their part or the part of any of them, if any, through the operation or maintenance of the boom.

Whether Beaver Creek is a navigable stream matters not; it was certainly a floatable stream in certain seasons of the year. In many of the early decisions liability for injury caused by running logs in a stream was generally held to depend upon negligence. In some of the cases that rule is not so strictly adhered to, but in this state, in the case of *Goodin's Ex'rs v. Kentucky Lumber Co.*, 90 Ky. 625, we held that if injury results from neglect of the boom owners in their logging operations a liability arises. If the stream in its natural condition is capable of being used to float rafts, logs, etc., and has in fact been used for that purpose the public has an easement in it and the right to so use it, but not in such manner as to destroy by neglect or wantonly the property of those on its banks. These considerations should govern the court upon a retrial.

For the reasons given the judgment as to Cole & Crane is affirmed and as to the Hatchers and Allen is reversed for further proceedings consistent herewith.

Finney and Turpin v. Commonwealth.

(Decided February 18, 1921.)

Appeal from Madison Circuit Court.

1. **Criminal Law—New Trial—Instructions.**—Excepting errors committed in the rejection or admission of evidence to which proper exceptions have been taken, as shown by the bill of exceptions, complaining party must include in its motion for a new trial any errors committed during the progress of the trial upon which it intends to rely in this court, otherwise they cannot be considered on appeal, and except in the matter of instructions this court can not consider errors that appear for the first time in the motion for a new trial.
2. **False Pretenses—Indictment and Information—Obtaining Money Under False Pretenses.**—An indictment which charges that the prosecuting witness has been induced to part with money because of false representations made to her by accused about the pendency of a secret lawsuit and that relying upon said representations as true she paid said money to accused is good on demurrer.
3. **False Pretenses—Obtaining Money Under False Pretenses.**—The test under Ky. Stats., sec 1208, as to obtaining money by false pretenses is not limited to the inquiry of whether the means employed by accused must be calculated to deceive persons of ordinary prudence and discretion since the protection of the statute was intended as well for the credulous, the careless, the ignorant and the helpless.
4. **False Pretenses—Obtaining Money Under False Pretenses.**—Whether the false representations are such as are calculated to deceive one of the capacity and understanding, and in the situation of the prosecuting witness, is a question of fact to be found by the jury.
5. **False Pretenses—Obtaining Money Under False Pretenses.**—Where the evidence shows that one of the accused, with the knowledge and concurrence of the other, makes the false representations charged, the conviction of both is warranted.

JOHN NOLAND, R. C. OLDHAM and A. FLOYD BYRD for appellants.

CHAS. I. DAWSON, Attorney General, and THOS. B. MCGREGOR, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellants, Lizzie Finney and Florence Turpin, were indicted on the charge of obtaining money by false pretenses and upon trial were found guilty and sentenced respectively to terms of five and three years in the penitentiary. Complaining of this judgment they have appealed.

Though several grounds are urged for reversal, we can notice only those contained in the motion for a new trial. It is provided in section 254 of the Criminal Code that "the grounds upon which a motion for new trial is made must be stated in writing and filed at the time of the making of the motion," and it seems to be well settled in this state that, excepting errors committed in the admission or rejection of evidence, to which proper objection and exception have been taken and shown by the bill of exceptions, it is necessary for the complaining party to include in the motion for new trial all errors committed during the progress of the trial upon which it is intended to rely in this court, otherwise they can not be considered on appeal; nor will this court, except in the matter of instructions, consider errors that appear for the first time in a motion for a new trial. *Thompson v. Commonwealth*, 122 Ky. 501, 91 S. W. 708.

One of the grounds for a new trial is the alleged admission of incompetent evidence and the rejection of competent evidence. Few objections to the testimony were made during the trial and in no instance do we find the ruling of the court prejudicial to appellants. We will consider, therefore, only the two remaining grounds appearing in the motion for a new trial.

In the first place it is said the court erred in overruling the demurrer to the indictment. The indictment alleged that appellants made certain statements to the prosecuting witness relating to the pendency of a secret lawsuit against her and if she, the prosecutrix, did not turn over to the appellant, Lizzie Finney, the sum of \$15,316.70, everything belonging to the complaining witness would be taken from her and her reputation ruined and that "relying upon said representations as true she did turn over to Lizzie Finney the sum of fifteen thousand three hundred and sixteen and 70-100 dollars." As grounds for the demurrer it is said the indictment is defective in that it does not state the complaining party believed the truth of the statements made, and that relying thereon she was induced to part with her property. *Bryant v. Commonwealth*, 104 Ky. 593, 47 S. W. 578, is cited in support of this contention. The indictment in that case did not allege the complaining witness either believed in or relied upon the representations alleged to have been made, and for this reason the indictment was held to be fatally defective.

In *Smith v. Commonwealth*, 141 Ky. 534, 133 S. W. 228, the indictment attacked as being defective contains this language:

"And relying upon said statements as true and believing in the truth of same the said Thompson advanced said Smith upon said tobacco \$35.00 in lawful money."

It was insisted in that case the indictment was bad because it failed to aver that but for the representations mentioned the prosecuting witness would not have advanced the money. In holding the indictment sufficient the court said it is not a matter of first importance what particular words are used to show that the person defrauded relied upon the truth of the false statements and was thereby induced to part with his money. Any words expressing the idea, or from which it can be clearly inferred, will be sufficient. The purpose of an indictment is to inform the complaining party in ordinary language the nature of the charge against him. Referring to the words above quoted the court says:

"This was in substance saying that Thompson was induced by the statements, which he believed to be true, to advance the money, and in effect a charge that he would not have advanced it except for the fact that the statements were made and he believed them. The accused, assuming that he had ordinary intelligence, could not fail to understand, after reading the indictment, the nature of the charge against him. Nor could the court have any difficulty in pronouncing judgment, as the indictment contains every averment necessary to constitute the offense charged."

To same effect is *Rand v. Commonwealth*, 176 Ky. 343, 195 S. W. 802. The indictment is not set out in full in the latter opinion, but the court says the indictment alleged that the county representatives from whom appellant fraudulently obtained money by false pretenses, relied upon the false statements made by him and the money paid him was obtained by reason of his false statements and representations. This was held to be a substantial averment that the defrauded party relied upon the false statements and representations and was thereby induced to part with his money. We think these cases ample authority to sustain the position that the statements in the present indictment were sufficient to fully apprise appellants of the charge against them. The words quoted substantially alleged that reliance upon the false statements and representations made by appellants

to the prosecuting witness and her belief in the truth of said statements were what induced her to part with her money. It is further alleged in the indictment that said statements were false and untrue as there was no secret suit pending against the prosecuting witness.

The court did not err, therefore, in overruling the demurrer to the indictment.

The remaining ground to be considered is whether the verdict is contrary to the evidence.

Before entering upon a discussion of this question we will digress long enough to read a few pages from the family history of the actors appearing in the scene soon to be presented. The prosecuting witness, Sarah Finney, is 63 years of age. She resided with her husband in the state of Florida until his death several years ago. He died seized of considerable real estate which was devised to his widow. After her husband's death Sarah Finney moved to Madison county in this state. This couple had an only child, a son, Will Finney, who married the appellant, Lizzie Finney, in 1904. Two children, Paul and Sallie, were born of this marriage. In 1919 their daughter married at the age of sixteen. Appellant, Florence Turpin, is a sister of Lizzie Finney. Will Finney does not appear to have had any fixed employment and depended largely upon his mother for support, not only for himself but for his family. For several years he and his family, as well as Florence Turpin, lived in the home of his mother. Lizzie Finney apparently had charge of the house, attended, in a large degree, to the household duties and paid the running expenses and upkeep of the establishment from money furnished by the mother-in-law. Because of his dissolute habits, Lizzie Finney was compelled to leave her husband, the separation taking place about January, 1920, at which time she went to live with her father in Estill county, and later moved with her son, sister and a brother, to Akron, Ohio.

About the time of the separation Sarah Finney disposed of a portion of her property for the sum of \$30,623.40, which amount was deposited to her credit in a Richmond bank. On January 26, 1920, Sarah Finney gave to Lizzie Finney exactly one-half of this amount, to wit: \$15,316.70. Of the sum so received by her, Lizzie Finney paid \$10,000.00 as part payment on the purchase price of a \$22,000.00 house in Akron, Ohio. But why this payment to Lizzie Finney? The story is a long, weird

one, reminding one of sacrifices to Moloch and of tribute paid to mythical and insatiable gods. This is the story. We will give it in narrative form as detailed by the mother-in-law, Sarah Finney:

Lizzie Finney told me we were in a secret lawsuit and she told me to pay her that \$15,000.00 and she would settle this lawsuit, and this is the reason I sold the property. She first spoke of the secret law-suit some seven or eight years ago; told me that if I did not do this, or that or the other that Will Gould would sue me; that Will said I had not done right and he did not like me and I was no good; now this man did not know a thing about me and I told her so and she told me, well, Granny, this is what he said. Just kept it up for seven or eight years. She first said Bertha Horn was going to sue her and make me a party because she could not make anything out of Lizzie, but she could out of me; she said if I would give her \$1,500.00 that she could settle the case and I promised to do so and I paid her the \$1,500.00 and she said she gave it to the lawyer to settle it. But every once in a while she would come back and say she was afraid Bertha would come again with that lawsuit; that she was still making threats and she suggested that I had better go down and have a will written so that it could be held in case Bertha did anything; so I fixed up the will as she suggested. Later she said, "Granny, Bertha is coming with that lawsuit again and it is worse than ever. She and Will Gould have gotten together and they want to get hold of you," and she said she was going to see the circuit judge, and later she came back and said the circuit judge said I would have to keep my "dues" paid up. This I did from time to time. She commenced at \$20.00 and finally got up as high as \$100.00. These dues were on account of this secret lawsuit she told me, so I paid all along, and she says she talked with another lawyer and he told her the same about keeping these dues paid, and finally she began begging me to sell the farm. Other times she would come in and sit down and cry over it and tell me we were in a terrible shape, we were in a close place and I would try to get the money together for the dues, and then she told me we would have to get a machine so she could attend to the business of this suit, that the circuit judge told her this must be done. I told her I was not ready to get a machine, but she insisted so that I finally purchased one for \$1,575.00 and she told me to tell the people that I gave

her this machine, as a present, so that it could not be taken in this secret suit. When she went to Akron she took the machine with her. Again she told me she had seen a lawyer at Frankfort, and he told her to have me sell the farm and divide it just to a copper, so when I received the money from the sale of the place I had the bank figure up exactly one-half (\$15,316.70) and I took the check to the hotel where she was and gave it to her. I had seen her the evening before and she asked me about the sale of the property; being unable on account of the late hour to get to the bank she insisted that I give her a memorandum to show the money was there and that one-half of it was coming to her. She told me when I gave her the money she was going to get the circuit judge to help her send it off. When she talked about this secret lawsuit she would drive the others, with the exception of her sister, Florence, out of the house. Florence Turpin was present at all these conferences.

Several months later Lizzie came to me and told me I had to sell another piece of land I had, and that I would have to give her just half of the proceeds to get rid of the lawsuit; that Will Gould was liable to take the land away from me and I had better hurry and sell it. She said the matter had gotten into the government's hands and to keep things straight it would be necessary to have \$4,000.00. On or about the 22nd of July I drew \$4,000.00 in currency from the bank and gave it to Lizzie; she first read to me a letter which she said was written by a lawyer at Akron, stating that if I would pay the \$4,000.00 he would end the lawsuit entirely, and I would not be bothered with it any more. She promised to have the lawyer fix up a receipt and send me but she never did so. She told me not to keep any papers concerning this matter.

In September, my son, in looking over my bank book, found these large withdrawals of money and inquired where I had been investing my money, whereupon, after pledging my son to absolute secrecy I told him what had happened. He assured me there was no lawsuit, secret or otherwise, and at his suggestion I talked to a lawyer about the matter. This lawyer told me I had been swindled out of my money and not to pay Lizzie any more money. Shortly thereafter Lizzie appeared on the scene again and told me a government official and lawyer had been to see her and that it was necessary for her to get \$2,000.00 more on this lawsuit. I told her I was not go-

ing to pay her another cent, and when I refused, after repeated requests and threats, Lizzie jumped out of the machine and shook her fist at me and told me if I did not give her the \$2,000.00 she would sue me for every cent I had and put me in the poorhouse. Thus reads this remarkable tale, at least a part of it. We do not think it necessary to give more.

The Bertha Horn referred to is a cousin of Lizzie Finney; Will Gould married a cousin of Sarah Finney and their families were on friendly terms. When asked on cross-examination, why she did not tell her lawyer or someone about the secret lawsuit, Sarah Finney says Lizzie told her that whatever she did not to hint it to the living, that she, Lizzie, would attend to it, and for her to keep quiet and not tell anyone.

Lizzie Finney denies *in toto* the conversation detailed by her mother-in-law, but admits receipt of the check for \$15,316.70. She says this money was given to her to rear and educate her two children and buy a home for them, but in making this statement she evidently forgot that when the check was given to her her daughter had married and moved to Fayette county. Instead of a home for her children it became one for her relatives. She says she rather objected to receiving the money, and advised her mother-in-law not to sell the property, but her mother-in-law insisted she was going to sell it and divide the proceeds. She files a number of checks covering several years' disbursements for household expenses. Most of these were given in the year 1917. She says she always had gotten along all right with her mother-in-law; there was no ill-feeling or unpleasantness between them until she filed suit for divorce; this seemed to have made her angry, as shortly thereafter her arrest followed.

Of the \$22,000.00 investment in the Akron residence and of the amount and disposition of the proceeds of its sale in September, 1920, little is known. The cross-examination of Lizzie Finney is marked by her extreme reticence. She was unable, or at least did not state with any degree of certainty or definiteness what had become of the proceeds of that sale. She could not remember the address of one with whom she had left a note given as part of the consideration, and this although the sale had taken place approximately just a month before. It is manifest she was not disposed to give all the facts. This

may have been due in a large measure to the fact that a civil suit was pending against her for this \$15,316.70.

Commenting upon the evidence of Sarah Finney, counsel characterize it as either the delusions of a disordered mind or the fabrication of a designing party for the accomplishment of some sinister purpose. Furthermore, that the question of the secret lawsuit is so ridiculous and absurd that the statements, if made, were not calculated to deceive a person of ordinary intelligence. That the means employed by the offending party must be calculated to deceive persons of ordinary prudence and discretion is one of the elements of the crime of obtaining money under false pretenses recognized in many jurisdictions, but this doctrine has been modified in this state, in the enunciation of a far more rational and just rule by which the full protection of the statute is given not only to the credulous and careless but especially to the ignorant and helpless. For instance in *Commonwealth v. Beckett*, 119 Ky. 817, 84 S. W. 758, it is stated:

“It may be said that a false representation or token is not within the statute ‘unless calculated to deceive persons of ordinary prudence and discretion. 2 Whar. Crim. Law, 2129; *Commonwealth v. Grady*, 13 Bush 285, 26 Am. Rep. 192. This is true only in a limited sense, for the statute was not designed to protect only the ordinarily wary and prudent, who, in spite of their vigilance, might be overreached by the clever rogue, but must have been aimed at all scoundrelism, who, by false statements or tokens, succeeded in hoodwinking the unwary, or even the foolish, into parting with their property. The statute has a twofold purpose: (1) To protect the owner of the property against cheats; (2) to punish the cheater. It can not be said that the law is partial to ‘persons of ordinary prudence and discretion’ in protecting them in their property, whilst it leaves imprudent and silly persons to lawful prey for frauds. On the other hand, in punishing the wrongdoer, his motive and its results are the main subjects of inquiry. Under this statute the wicked purpose—the fraud—is equivalent to the same ingredient in theft. So is the result the same. The distinguishing feature is, in theft the owner does not intentionally part with the title and possession of his property, while under this statute he does. It would not do to say that to steal from a careless or imprudent person is not punishable, though the statutes against larceny aim to

protect the owner in the possession of his property, as well as to punish the thief who purloins it. Under the statute being considered the pretense or token must be false. Where a token is used, it must be calculated to deceive, according to the capacity of the person to whom it is presented to detect its falsity under the circumstances. A token that might be calculated to deceive a blind man, or one in the dark, or a child, would not necessarily be a false token when used upon one who could see, and who has mature judgment. *Peckham v. State* (Tex.) Cr. App.) 28 S. W. 532. . . .

"Whether the false token is one calculated to deceive one of the capacity and understanding and in the situation of the prosecuting witness is a question of fact to be found by the jury. *Wagoner v. State*, 90 Ind. 507. In *People v. Oyer and Terminer*, 83 N. Y. 436, it is laid down distinctly that the pretense must be calculated to deceive, leaving that to be determined by the jury; and, if the pretense was capable of defrauding, it is sufficient."

To same effect see *Commonwealth v. Watson*, 146 Ky. 83, 142 S. W. 200; *Gregory's Criminal Law*, Sec. 376.

These same considerations must control us here. As jurors the case may not have impressed us. To many it may appear a pure fabrication, so improbable of belief as to be incapable of misleading or deceiving the most unsophisticated. And yet every day, confidence men, so-called, are extorting money through schemes and guises so old and simple it seems improbable that anyone could or would be ensnared by their artifices though among their victims are oftentimes found persons of more than ordinary intelligence.

We can not, under the circumstances, say the verdict is flagrantly against the evidence. There is a contrariety of testimony. The issue was for the jury. They saw the witnesses and having found appellants guilty we find no ground to reverse their judgment, nor do we find any merit in the contention that the evidence does not support the charges in the indictment.

Florence Turpin was present, encouraging and corroborating the statements of her sister and assisted her in inducing Sarah Finney to part with her money. Under such circumstances, where the evidence shows that one of the defendants with the knowledge and concurrence of the other makes the false representations charged, the conviction of both is warranted.

While perhaps unnecessary, we might add that the circuit judge and the attorneys mentioned in the evidence are not shown to have had the least knowledge of or connection with any of the remarkable statements attributed to them.

The judgment is accordingly affirmed.

Rogers-Siler Grocery Company v. Pickrell-Craig Company.

(Decided February 18, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Fourth Division).

1. **Contracts—Issues, Proof and Variance.**—Under the common law practice it was a fatal variance when the proof showed a differently evidenced contract from the one declared on, as, for instance, proof of a written contract where the pleadings alleged an oral one, and vice versa, and this was true whether the variance was or not material; but this harsh rule has been modified by sections 129 and 130 of our Civil Code of Practice, which do not permit a litigant to be defeated because of a variance, unless it is a material one, and it is not material unless it misleads the litigant to his prejudice, and the burden is on the one claiming to have been misled to show that fact to the satisfaction of the court. Under this modification of the common law rule a suit based on an alleged oral contract will not fail because of proof of a written contract conforming substantially in every particular to the alleged oral contract.
2. **Contracts—Issues, Proof and Variance.**—A variance, in law, means a difference between an allegation of a litigant's pleading and his proof sustaining it, and does not mean a difference between his allegation and his opponent's proof concerning it.
3. **Contracts—Consisting of Separate Sheets of Paper—Alteration or Modification.**—A written contract whether required to be in writing or not may consist of separate parts on separate sheets of paper, though each be executed and agreed to at different times, and a written contract may be altered or modified by another written stipulation, though the latter be contained in a letter addressed to the other party, and although there may be no change or alteration in the words of the originally drafted contract, and if such modification is made at the suggestion of the other party the contract will be complete as soon as the letter containing it is

mailed, provided it is written within a reasonable time after the request for the modification.

W. FOSTER HAYES, E. B. ANDERSON and FRED FORCHT for appellant.

GEO. D. CALDWELL and TRABUE, DOOLAN, HELM & HELM for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

Appellee and plaintiff below, Pickrell-Craig Company, a corporation, sued the appellant and defendant below, Rogers-Siler Grocery Company, also a corporation, in the Jefferson circuit court to recover damages alleged to have been sustained by plaintiff because defendant failed and refused to accept and pay for 400 bags of Colorado Pinto beans which plaintiff as a wholesale dealer in produce claims to have sold defendant on the 22nd day of October, 1918, under an oral contract entered into over the telephone between Louisville and Owensboro. The damage claimed was the difference in the market value of the beans at the time defendant agreed to accept and pay for them under the terms of the contract, and the price which it agreed to pay for them under the contract, and other items such as freight, storage, etc., legally recoverable in such cases, aggregating a total sum of \$913.36. The answer put in issue all of the affirmative allegations of the petition and at the trial the only issue seriously contested was the one denying that defendant, on the day specified, or at any other time, entered into the contract sued on. That the beans were ordered by plaintiff, that they were shipped from Colorado and arrived in Owensboro on time, and that the items composing the damages sued for are correct, were each and all practically admitted, or indisputably established. The court at the close of all the testimony peremptorily directed the jury to return a verdict in favor of plaintiff, which was done, followed by a judgment in its favor for the amount sued for, which defendant seeks to reverse by this appeal.

Clearly from what has been said the only question for determination is whether there was a contract for the purchase of the beans, and if so, whether it was one upon which plaintiff could recover under the state of its pleadings which, as we have seen, alleged an oral contract of sale. The only evidence in the record relating to the con-

tract is the testimony of Otis W. Pickrell, plaintiff's president and general manager; the testimony of B. F. Siler, who sustained a similar relation to defendant, and some letters and writings to which we will hereafter refer. Pickrell testified that his company had for quite a while transacted business with the defendant (it being engaged in the wholesale grocery business in Owensboro) and that it was plaintiff's only customer at that place; that on the day the contract is claimed to have been executed he called Mr. Siler over the telephone and conversed with him relative to the purchasing of the beans and that the latter agreed to take them upon the terms proposed and that he accepted the order and later, on the same day, ordered from a firm in Colorado the shipment of the beans to Owensboro, Kentucky, and that they arrived within the time agreed upon in the contract when defendant refused to accept them. He also testified to the items of damage, but which as we have seen are not seriously contested. On the same day (but after the beans were ordered) plaintiff wrote defendant a letter containing this statement: "Confirming telephone conversation, enclosed herewith please find contract covering 400 bags of Colorado Pinto Beans for November shipment booked at \$7.50 F. O. B. Colorado, car to be loaded with 800 bags and to be stopped at Owensboro, Ky., 400 bags of which are to be taken out there and the remaining 400 bags sent on to Louisville." With that letter there were enclosed two copies of a writing in the nature of a memorandum confirmatory of the contract, in which writing the terms of payment are stated to be "F. O. B. Colorado Common Points, net cash payable ten days from date of draft." It was contemplated that the draft would be drawn on defendant by the Colorado firm who shipped the beans and would be mailed to defendant at the time of the shipment and would under the above stipulation be payable ten days thereafter whether the beans had arrived or not. Defendant made objection to this because it desired to inspect the beans after their arrival at Owensboro before paying for them, and accordingly on October 23, 1918, it wrote plaintiff, saying:

"We are returning herewith contract on Colorado Pinto Beans, requesting that you change the terms of your contract to read f. o. b. Colorado Points, net cash payable on arrival of beans, instead of payable ten days from date of draft.

"We feel that it is only fair to us to know what we are getting in this line of merchandise. In fact these are the only terms that we will accept this car on. Really we prefer to cancel the car being offered today \$7.25 f. o. b. Colorado on the same goods, but, will take the beans if the contract is fair to us and we insist that the inclosed contract is not fair. The beans are usually 30 days arriving here." It is testified by Siler that he returned to plaintiff both copies of the memorandum contract in that letter, but Pickrell denies this, and the circumstances appearing in the case, but which are not necessary to here relate, strongly sustain his denial. There was, however, enclosed in that letter the carbon copy of the memorandum contract and it was altered so as to make the draft payable on "arrival of car." On the same day (October 23rd) plaintiff wrote defendant a letter in which it said, *inter alia*: "They (the beans) should come through from Colorado in ten days and if they are out a few days longer than that time it is perfectly agreeable to us that you hold the draft until arrival and examination." Pickrell testified that he enclosed in that letter the altered or modified carbon copy of the contract which had been returned to him, but Siler denied any such enclosure and he likewise denied that he ever received from plaintiff the original copy of the contract after he returned it with his letter of October 23, although it was in his possession and he produced it at the trial. Upon receipt of plaintiff's letter of October 23rd, in which it agreed to the draft to be payable after "arrival and examination" of the beans, and on October 25th, defendant wrote plaintiff, "We still maintain that the enclosed contract is arbitrary, unfair and unsatisfactory, and have not and will not arrange to sign such a contract." Other correspondence followed, resulting in defendant declining to accept the beans, which finally culminated in this suit. Siler admitted the telephone conversation substantially in the terms testified to by Pickrell, except that he stated that "he (Pickrell) said he would send me a satisfactory contract. When the contract arrived, it was not satisfactory, not payable on arrival and examination of beans." In another part of his testimony he admits buying the beans at the price agreed upon but that they were "subject to payment on arrival and examination of the beans."

Under this condition of the proof it is first contended that if there was any contract at all for the purchase of the beans it was a written and not an oral one, and that plaintiff having declared on an oral contract its suit should fail upon proof of only a written one. In other words, it is insisted that the variance between the oral contract declared on and the written one (if proven at all) is a material variance, so as to constitute a failure of proof, and necessitate a dismissal of the action, and in support of this contention we are cited to the text on page 753 of 13 Corpus Juris, which is in language broad enough to support the contention; but whether the jurisdictions, whose opinions are cited in support of the text, adhere to the common law practice, or whether they are governed by code provisions we do not know; but the rule announced by them would strongly indicate that they administered the technical and arbitrary rules of common law procedure, which it is well known were so strict as to amount in many instances to a practical denial of justice. Under them any kind of variance between the allegations of the pleading and the proof was fatal, whether the variance was material or immaterial, or whether or not it misled the opposite party to his prejudice. One of the purposes in the enactment of codes of practice was to remove this and other strict rules of the common law practice, some of the requirements of which were wholly immaterial, and which in no manner affected the merits of the controversy or prejudiced the rights of the parties in the prosecution or defense of the suit. It is therefore enacted in section 129 of our Code that: "No variance between pleadings and proof is material, which does not mislead a party, to his prejudice in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and, thereupon, the court may order the pleading to be amended upon such terms as may be just;" and section 130 thereof says:

"If such variance be not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment." In section 131, it is provided in substance that it is only when the allegation is unproven "in its general scope and meaning" that the variance is material and will be fatal unless the pleading is amended.

The contract sued on in this case is not one which the law requires to be in writing; and if such a contract is reduced to writing it manifests only a method which the parties adopted to evidence their contract, *i. e.*, it is evidenciary only and the writing is not legally essential to the validity of the contract. If it develops in the proof that the contract was in writing but its terms and obligations are substantially the same as those declared on as resting in parol only, it is difficult to see how the one denying the existence of the contract can in any manner be misled to his prejudice. The principle of practice is altogether different from the one announced in the cases of *Newton's Executor v. Fields*, 98 Ky. 186; *Price v. Price's Ex'r*, 101 Ky. 28; *Smith v. Robinson*, 185 Ky. 76, and *O'Kain v. Davis*, 186 Ky. 184, wherein it is held that a recovery or a defense may not be sustained upon reliance on an express contract where only facts are proven which would raise an implied contract. It requires no analysis to point out the wide difference between the two cases. Multifarious are the facts from which an implied contract will arise, and to permit one to recover or defend under proof of such facts when he had declared on an express contract, would place his antagonist at a great disadvantage at the trial in being required to anticipate and meet testimony concerning the many facts out of which an implied contract could arise when he was only called upon in the pleadings to refute the claim of a definitely alleged express contract.

Nor does the principle announced in the case of *Gainesboro Telephone Co. v. Buckner*, 160 Ky. 604, apply to the facts in this case. There it was held that the variance between plaintiff's allegations and his proof was material and amounted to a failure of proof and was a case where some one or more of plaintiff's allegations were unproven "in its general scope and meaning," which brought the case directly under the provisions of section 131 *supra* of our Civil Code.

We therefore conclude that the variance, if any, contended for in this case was, under sections 129 and 130, *supra*, of the Civil Code, immaterial and therefore not fatal to plaintiff's cause of action. This court so held in the cases of *Illinois Central R. R. Co. v. Curry*, 127 Ky. 643 and *B. & O. S. W. R. R. Co. v. Wood*, 130 Ky. 839, in each of which opinions the conclusion of the court was rested upon the provisions of the Code *supra*. Defend-

ant's counsel seeks to avoid the effect of those decisions upon the ground that defendant in each of them, in their respective answers, denied the oral contract relied on by the plaintiffs therein and *affirmatively alleged* that the contract sued on was not an oral one but was in writing. The facts as to the conditions of the pleading in those cases are as counsel contends, but this court did not stress that feature of the case as the controlling reason for the opinions. It was mentioned only incidentally and was only a persuasive fact for the conclusion reached. We are unable to draw a distinction between a litigant who relied in *his pleading* upon a differently evidenced contract, and one who relied in *his proof* upon a similarly evidenced contract. In each case the discrepancy relied on affects a matter which is merely evidentiary and is available for whatever it is worth whether pleaded or not.

It is insisted by plaintiff's counsel that a technical variance in law is a material difference between a party's pleading and *his proof*, and can not arise when the variance is produced by the opposite party's proof. This contention embodies a sound rule of practice as is laid down in 22 Encyclopedia Pleading and Practice, pages 528-530 inclusive, but this admittedly correct principle can not be invoked by plaintiff in this case, since the peremptory instruction could not be sustained alone on proof of the oral (telephone) contract relied on, for, as we have seen, the witnesses contradict each other as to whether it was a completed one.

It is next insisted by defendant that, assuming it competent to consider the writings in this case, they do not evidence or create a binding contract upon defendant. We can not agree with this contention. If we should accept only the testimony of Mr. Siler, who says that in the telephone conversation plaintiff agreed to give his firm (the defendant) an opportunity to examine the beans before the draft covering their price should be paid, and also accept his testimony that the copy of the contract, as altered by plaintiff on October 23rd, was never returned to defendant, we still have the statement in plaintiff's letter of that date agreeing for defendant to "hold the draft until arrival and examination" (of the beans). This was all that defendant contended for and it was readily agreed to when plaintiff's attention was called to it. When defendant returned the contract (or both copies as the case may be) to plaintiff on October 23rd, all it

asked was the privilege to examine the beans after their arrival in Owensboro, and it requested an alteration of the contract, or (what was tantamount thereto) an agreement by plaintiff giving it that privilege. Immediately, and on the same day, the letter of plaintiff addressed to defendant contained a stipulation granting the privilege asked for, and whether that stipulation was written in the memorandum of the contract or upon a separate piece of paper can not affect the rights of the parties.

The practice of the case conforming to the views herein expressed, it results that the judgment was proper and it is affirmed.

Chesapeake & Ohio Railway Company v. Commonwealth, By, etc.

(Decided October 22, 1920).

Appeal from Franklin Circuit Court.

1. **Taxation—Authority to Make Assessment.**—Where the board of valuation and assessment has duly considered a report filed by a railroad company in fixing the value of its franchise, the conclusion of the board is final where it had before it the data necessary to enable it to fix a proper valuation upon said franchise—no fraud being shown.
2. **Taxation—Spoliation.**—If the assessing board acts corruptly or fraudulently or makes an assessment amounting to spoliation or by mistake or oversight the property is so assessed as to amount to double taxation, adequate relief will be granted an aggrieved taxpayer.
3. **Taxation—Failure to Assess Property.**—Failure of a corporation to report any item or species of property that it is called upon to report together with its value is an omission and not an undervaluation of its property and may be assessed in a suit brought for that purpose.
4. **Taxation—Omitted Property.**—In a suit to assess alleged omitted property the Commonwealth must first show the omission of any property that should have been reported together with its nature and value and when this is done the corporation must show by clear and convincing evidence that notwithstanding the omission the board in making the assessment considered and assessed the value of the alleged omitted property from information gathered from sources outside the report.
5. **Taxation—Omitted Property.**—In a suit to assess alleged omitted property where the testimony conclusively shows that the assess-

ing board had before it the information necessary to enable it to arrive at a fair valuation the petition should be dismissed.

6. **Taxation—Review of Assessment.**—It is alleged that a railroad company in making its report to the auditor included in the item designated "other expenses" various items which were in reality profits and not expenses, but since the evidence conclusively shows that the details of the several items were explained to the members of the board and they were fully apprised as to the nature thereof, the board having before it the same data as presented by the present record, this court is without power to review the action of the board, which, under the circumstances, is final.

HUNT, NORTHCUTT & BUSH, R. L. NORTHCUTT, T. L. EDELEN and WORTHINGTON, COCHRAN, BROWNING & REED for appellant.

PAUL C. GAINES, County Attorney, LESLIE W. MORRIS, HAZELRIGG & HAZELRIGG, HOBSON & HOBSON and CHAS. I. DAWSON, Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

This appeal brings in question the correctness of the assessment of appellant's franchise for the taxable years 1907 to 1911 inclusive.

Railroads and other corporations performing any public service or exercising any special or exclusive privileges not allowed by law to natural persons are required to pay an annual tax on their franchise to the state. Ky. Stats., sec. 4077.

In order to enable the board of valuation and assessment (at that time charged with the duty), to fix the value of said franchise, appellant and other companies were required each year to report to the Auditor of Public Accounts, on a form prescribed by him, a verified statement containing certain detailed information as provided by Ky. Stats., sec. 4078.

The form so prepared by the auditor, in addition to other data, called for a statement of the gross and net earnings or income. Following the line for the gross income are eight enumerated credits, designated in the report as expenses, to-wit, salaries, wages, interest, dividends, enlargement of plant, maintenance of equipment, depreciation and "other expenses." But one line is given for each. By deducting these several items from the gross income the net income is found.

Appellant filed its reports for each of the years involved.

A franchise tax is a property tax and is nothing more than the taxation of all the corporation's intangible property, including its capital. To ascertain the value of this franchise it is provided in Ky. Stats., secs. 4079 and 4080, that from the report filed by the company and from such other evidence as it may have, the board shall fix the value of the company's capital stock and from the amount thus fixed shall deduct the assessed value of all the tangible property in the state.

The board is vested with a large discretion in determining the value of the franchise; several methods have been adopted in so fixing it, e. g., the stock and bond method, addition of the surplus to capital or the capitalization of the net income. It may adopt any one of these, or indeed the several processes may be combined. *Hager v. American Surety Co.*, 121 Ky. 791, 90 S. W. 550.

We are not advised as to the method adopted by the board in fixing the value of appellant's franchise for the years in litigation. Appellee insists it was by capitalizing the income, and there is much ground to sustain this view.

It is appellee's contention that under the designation of "other expenses" the company included a number of taxable items that instead of being expenses were in fact profits. Using the year ending June 30, 1906, as an illustration, the item "other expenses" was made up as follows:

Payment on principal of equipment trust bonds	\$ 998,333.33
Extraordinary expenditures for improvements, etc	1,534,406.09
Greenbrier Railway Sinking Fund.....	20,000.00
Discount on bonds sold, etc.....	17,500.00
Securities sold and written off.....	398,321.47
Old accounts written off.....	5,286.21
Loss on C. & O. Steamship lines, etc.....	60,366.37
Total.....	\$3,034,213.47

If, therefore, this amount or any portion thereof was improperly deducted from the gross income or earnings apportioning to Kentucky its due share, it can readily be seen how materially this would have affected the valuation of the franchise.

Capitalizing this sum on a basis of 6 per cent. on Kentucky's proportion (29.64 per cent. of appellant's line be-

ing in this state), gives a total of \$14,888,924.54; equalizing this amount at sixty per cent. gives a net sum of \$8,933,354.72.

Kentucky Statutes, sec. 4083, is as follows:

"It shall be the duty of the auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the board may change the valuation as it may deem proper, *and the action of the board shall be final.*"

At the outset it becomes important to inquire into the finality of the board's action. In *Coulter, Auditor v. Louisville Bridge Co.*, 114 Ky. 42, 76 S. W. 29, an attempt was made to reconsider appellee's franchise assessment, it being contended that a new board could review the action of its predecessor. But this right was denied, the court saying:

"We are of opinion and hold that when the proper assessing officers, within the time and substantially in the manner prescribed by statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and no relief has been obtained within the time allowed by statute for correcting their action, if erroneous, that action is final."

First National Bank v. Hopkinsville, 128 Ky. 383, 108 S. W. 311, 16 L. R. A. (N. S.) 685. Here it was claimed the bank had not received proper credit on account of United States bonds owned and held by it, but the court says it could not presume that no reduction had been made on this account. In the opinion it is said:

"The only way by which we could ascertain this fact would be to examine the assessment and determine whether or not a proper valuation was fixed upon appellant's shares of stock. The effect of this would be to substitute the judgment of the court for that of the assessing officers; in other words, to make a new assessment. This is not a case where the assessment is void. Nor is it a case where a party is assessed upon property which he does not own. It is simply a case where the claim is made that the assessment is too high because appellant was not given credit in the assessment fixed for the amount of its

government bonds. In order to hold that appellant is entitled to recover, we would have to say that the assessment was too high. This we have no power to do after the assessing officers have passed upon the question, and no complaint has been made to them within the time prescribed by law."

Southern Pacific Co. v. Commonwealth, 134 Ky. 410, 120 S. W. 309. In this suit it was charged that the valuation fixed by the board was unauthorized, illegal and void and the Commonwealth asked for a writ of mandamus to require the board to meet again and assess the company's franchise for the years named. We quote from the opinion as follows:

"This was an exercise of judgment on their part. The statute confided to them the valuing of the property. The taxes were paid upon the valuation. Their action was not void. They discharged the duty devolved upon them by the statute as best they could, and, if they erred in judgment, that is no reason why the court should award a mandamus against them requiring them to meet again and make an assessment of the franchise. If a mandamus were awarded, the present board would only be able to make another lump assessment on the same report."

After referring to *Coulter, Auditor v. Louisville Bridge Co.*, *supra*, the opinion continues:

"Here the board in the years named acted upon the reports returned to it and made an assessment. Their action is final, and the present board is without authority to act in the premises."

To the same effect is *Kentucky Heating Co. v. City of Louisville*, 174 Ky. 142, 193 S. W. 4, in which many authorities on this proposition are collated. In summing up the effect of the several decisions the court concludes that when it is clearly made to appear that the assessing board acted corruptly or fraudulently, or made an assessment amounting to spoliation, or by mistake or oversight property is assessed in such manner as to subject it to double taxation, the aggrieved taxpayer will be granted adequate relief. And if the board, from the facts and figures reported to it, made an erroneous assessment, due to mistake on the part of the board in applying the law, the court will review the finding and grant the necessary relief. "But," to use the language of the court, "where the mistake complained of is a mere error of judgment involving only the correct valuation of the property, as

where the taxpayer insists that it should be valued at one sum and the board values it at another and a higher sum, the finding of the board will be conclusive and the court will not undertake to review or correct it unless it is clearly shown that the valuation fixed by the board is so excessive as to amount to spoliation."

In *Commonwealth v. Kentucky Heating Co.*, 180 Ky. 607, 203 S. W. 538, upon a reconsideration of the opinion reported in 176 Ky. 35, 195 S. W. 459, it is said that when a corporation fails to report any item or species of property of any kind or character owned by it that it is called upon to report to the board and the value thereof, the failure to report such item of property and the value thereof is an omission and not an undervaluation of its property by the corporation and this item may be assessed at the suit of a revenue agent or the sheriff in the manner provided by statute. Also that in a suit to have alleged omitted property assessed, the burden is on the Commonwealth to show the omission of property that should have been reported, and the nature and value of same, and when this is done the burden is on the corporation to show by clear and convincing evidence that notwithstanding the omission, the board in making the assessment considered and assessed the value of the omitted property on information gathered from sources outside of the report.

In the present suit the Commonwealth has pointed out the items which it claims were omitted. In other words, though listed as "other expenses," it is urged they were not properly classified and to this extent, and for this reason, appellant was assessed and paid franchise taxes on an amount much smaller than that warranted and authorized by the facts.

L. & N. R. R. Co. v. Commonwealth, 181 Ky. 193, 204 S. W. 94, was a proceeding instituted by a revenue agent seeking to have assessed against the company what was claimed as omitted intangible property, and among other questions this suit involved an item of \$277,820.92 reported by the company under the head of "other expenses." Being unable to ascertain from the record the true facts as to this item, and whether it should have been deducted from the earnings, the matter was referred to the trial court for a proper adjustment of same, with instructions that if the proof showed it was in reality earnings or income, and had been falsely or inaccurately reported, thereby decreasing the value of the company's franchise,

a judgment should be entered making the correction according to the method employed by the board in assessing the company's intangible property for that year.

Preliminary to the question of whether the items pointed out by the Commonwealth were concealed or improperly deducted from the earnings, is the inquiry as to whether appellant has shown by satisfactory and sufficient evidence that notwithstanding the omission, if there was such, the board in making this assessment considered or assessed the value of the alleged omitted property on information gathered from sources outside of the report; because if such be the case, the conclusion of the board being final, we are not permitted to examine into these items, nor to correct the assessment.

On this question the Commonwealth introduced three witnesses: (1) the secretary of the board of valuation and assessment for 1917 and 1918, who merely testified as to the minutes of the board during the years involved; (2) Frank James, auditor for 1908-1912, who had no specific recollection of what occurred before the board while he was a member of same. He did not recall that a representative of appellant had been before the board, and did not think the board had before it the stockholders' reports, and that the board never used these reports in making the assessments; (3) H. V. McChesney was a member of the board from 1905 to 1908. He says tentative assessments were usually made from reports made to the auditor. He has no recollection as to what was done in any particular year. He could not state positively whether the board had the stockholders' reports, but he says a representative of the company usually made an argument before the board and responded to questions. And, to use his language, "we asked them particularly about the big items that were not quite self explanatory, like 'other expenses' items. . . ." This was all the evidence introduced by the Commonwealth.

As to the testimony adduced by appellant: Polk Laffoon was secretary of the board for 1906 and 1907. He says it was the practice of the board to have representatives of the companies come before it to submit such data as they had either printed or oral; to explain all the items in the report so that the board would be furnished with everything it wanted, and all information necessary in making a correct and proper valuation; he thinks a representative of appellant came before the board each year.

Furthermore the board required the company's representative to explain the items bracketed in the report under the headings of enlargement of plant and "other expenses;" that Mr. Wall always brought with him his annual report, and showed the board the items making up the "other expenses" as contained in his report, all of which was disclosed in detail in the annual reports which the board had before it.

Garrett B. Wall, assistant federal manager at the time his testimony was given, says he appeared before the board each year; he procured from the comptroller a memorandum showing the items which went to make up the totals in their franchise reports under the heads of "other expenses and enlargement of plant," and he submitted this to the board. These items were identical to the items contained in the report to the stockholders and he always had the report of the stockholders with him. He says the board asked him for information as to the separate items making up the "other expenses" and he showed them where it was and what the items were; that the items constituting "other expenses" were not given in detail in the report to the auditor, because the form prepared by the state did not provide for them.

Dr. Ben L. Bruner, was secretary of state from 1908-1912, during which time he was a member of the board. He says the board discussed the item "other expenses" and when Mr. Wall appeared before them they would ask him about it. That Mr. Wall usually had with him the annual report to the stockholders, also a station report. The board called for them all the time. According to this witness the board generally tried to satisfy itself that proper statements had been made. Mr. Wall always had a report showing the accounts entering into the item "other expenses."

C. W. Parrish, was secretary of the board from 1908 to 1912, succeeding Laffoon. He says Mr. Wall was before the board every year; he always brought his annual report and a great many other figures and he would explain in detail what reports they were in; the board always questioned him in regard to these different items. It was nearly always the custom of the board in fixing franchises, if they thought the item "other expenses" was large, to bring the people before the board and question them as to these expenses and Mr. Wall always brought the information requested.

It is difficult to see how there can be any difference of opinion as to the effect of this testimony, the substance of which we have endeavored to give. The conclusion seems irresistible that the board in fixing the value of appellant's franchise for the years involved had before it the information necessary to enable it to arrive at a fair valuation thereof.

It would seem the company has sustained the burden cast upon it in the introduction of the character of proof this court has held necessary for that purpose. The evidence establishes the fact that the board was advised as to the items embraced in "other expenses" as reported to the auditor. Although we might be satisfied the valuation fixed by the board was too low, we can not correct it. The duty devolved upon the board to exercise its judgment and to fix the value of the franchise and if the reports and other data furnished the board by appellant disclosed substantially the same facts as presented by the record, and from the evidence we are constrained to believe this was the case, we are without power to order a revaluation or reassessment—the action of the board precludes it.

Railroads operating in the state are now required to furnish to the State Tax Commission, upon request, a true copy of all reports of income or earnings made to their stockholders, or furnished to the Interstate Commerce Commission, act of May 2, 1917 (Ky. Stats., sec. 4019a-15). If it has not done so, it would be well for the commission to avail itself of this provision. In an act of April 11, 1917 (Ky. Stats., sec. 4114i-11), creating the State Tax Commission, that body is vested with all the powers and duties as to the assessment of property for taxation theretofore formerly exercised or performed by the State Board of Valuation and Assessment and other specified agencies. In sec. 10 of said act (Ky. Stats. 4114i-10), it is provided that the commission shall keep a record of its proceedings. It would be well to have a stenographic report of all of its proceedings and of everything that transpires during the sessions, especially in any hearing or argument relative to corporate assessments. Such procedure, if followed, will remove the element of uncertainty as to the steps taken in fixing assessments and in case of litigation growing out of the assessment would enable the court to know exactly what transpired and what the assessing body considered in reaching its conclusions.

The term "other expenses" is too general and indefinite. To avoid confusion and misunderstanding the items constituting same should be stated separately, and if the form submitted does not provide sufficient space, the reporting companies can attach to the report a supplement indicating the accounts included and the amounts of each. It would then not be necessary to rely upon the recollection of ex-members and others many years afterwards when the press of other matters must necessarily have beclouded their memory.

There is no evidence appellant withheld any information that should have been furnished the board, nor does the evidence show the concealment of any of the company's assets; at most it was but an error of judgment on the part of the board in undervaluing appellant's franchise. What we have said includes all items claimed to have been omitted.

The judgment is reversed with instruction to dismiss the petition.

Church, et al. v. Wright Machine Co.

(Decided December 17, 1920).

Appeal from Daviess Circuit Court.

1. Contracts—Rescission.—Before a purchaser of personal property can have a rescission of a contract, he must put the seller in statu quo by returning the property purchased if it be of value, or offering to return it if it be refused.
2. Contracts—Rescission.—The purchaser of personal property can not have a rescission of the contract unless he return the property purchased to the seller at the place of delivery within the time specified in the contract, if such a time be fixed; and if no time be fixed by the contract then within a reasonable time, the facts and circumstances considered.
3. Contracts—Rescission—Damages for Breach.—If personal property when delivered is not in compliance with the terms of the contract of purchase, the purchaser may have relief in one of two ways: (1) return the property and have a rescission of the contract; (2) retain the property and sue for the damages suffered by reason of the breach of the contract.

E. B. ANDERSON for appellants.

W. P. SANDIDGE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

About April 1, 1916, Church and Rogers by a written contract purchased from appellee, Wright Machine Company, a dredge machine of a specific size and character, at the price of \$4,000; \$1,000 was paid in cash and the balance was paid on delivery of the machine at the shops in Owensboro on May 23, 1916. The machine was purchased for the express purpose of digging and cleaning out ditches and doing other dredge work of that nature. According to the contract the manufacturers were to set up the machine and put it in good running order, and the company warranted it free from defects in material and workmanship. After it was set up by the makers its foreman undertook to operate the dredge machine but had great difficulty in doing so because of the insufficiency of the power of the engine, defectiveness of material and poor workmanship in the construction of the machine. The machine gave way in many parts and was altogether unsatisfactory. After trying it for several months, at the instance of the manufacturers, the machine was returned to the shop to be rebuilt and when it came out again it operated no better than at first, and even appellee's agent, Kersey, who was the inventor of the machine, undertook to operate the machine and gave up in despair, admitting that the machine was too imperfect to perform the work for which it was constructed. Finally, about July 1, 1917, both the maker and the buyers abandoned the machine on a ditch where they had or were attempting to operate it, and each declined to have anything further to do with it.

Shortly thereafter Church and Rogers instituted an action against the Wright Machine Company for a rescission of the contract. The case was prepared and went to trial but at the conclusion of the evidence for the plaintiffs the court was about to sustain a motion for a directed verdict in favor of the machine company when the plaintiffs, Church and Rogers, dismissed their action without prejudice. This we learn from the briefs of counsel in the case, although that is not the judgment from which this appeal was taken. That motion was about to be sustained no doubt on account of the failure of the plaintiffs, Church and Rogers, to place the machine company in *statu quo* by returning the unsatisfactory machine to the place of delivery. Immediately after the dismissal of that action, Church and Rogers returned the dredge machine to the plant of the Wright Machine Com-

pany at Owensboro, where it had been received, demanded the purchase price paid, which was refused, and immediately brought this action for a rescission of the contract, alleging that the machine was wholly unsatisfactory and unsuited for the purposes for which it was intended and for which they purchased it, and that they returned it to the Wright Machine Co. and demanded their money, \$4,000, which had been refused. Issue was joined and after hearing the evidence offered by plaintiffs, Church and Rogers, the court sustained the motion of the machine company for a directed verdict in its favor on the ground that the plaintiffs, Church and Rogers, had failed to return, or offer to return the dredge machine to the machine company within a reasonable time, no time having been fixed in the contract for such return of the property in case of a rescission, and dismissed the action, and this appeal results.

It is admitted that the machine proved unsatisfactory and was not suited to the work for which it was purchased and intended to be used. It is also admitted that the machine company was unable to rebuild it so as to make it satisfactory; that the machine was fully paid for by Church and Rogers and was left by them on the ditch some eighteen miles from the shops where it was built; that it was not returned by Church and Rogers to the machine company for more than two years after its purchase and more than ten months after Church and Rogers had ceased to operate it. So, the only question necessary for us to determine is the correctness of the ruling of the trial court in holding, as a matter of law, that the delay of ten months on the part of Church and Rogers in returning the machine to the seller was unreasonable and, therefore, not such a delivery or return of the property as would entitle them as buyers to a rescission of the contract even though it be admitted that the machine was wholly unfit for the purpose which it was built and sold.

When a buyer determines not to abide the contract but to ask a rescission he must restore the property obtained under the purchase to the seller at the place of delivery unless he is prevented from so doing by some act of the seller, the property is worthless, or there is some other valid excuse; and he must not delay delivery beyond a reasonable time, and a reasonable time is such as will enable him by the exercise of ordinary diligence to carry the property to the place of delivery, its

nature, character and size considered. Until he does this he is not entitled to maintain an action for a rescission of the contract.

It has been held in many cases that a delay of a few weeks or even one or two months in the return of machinery is not unreasonable, but all this depends upon the nature of the property and circumstances of the case. There is and can be no hard and fast rule by which to determine what is and what is not an unreasonable delay, but this in some measure depends upon the convenience of the parties; the size of the machinery; the distance it has to be moved; its weight and also the ability of the parties.

In the case at bar the plaintiffs kept the dredge for about two years from date of purchase before making a return of it to the factory at Owensboro, and left it at the place of its abandonment for more than ten months before returning it to the maker as an indication of their intention to rescind the contract. It seems to us that this was an unreasonable time to wait, and such delay without excuse or reason is *per se* such as will bar the buyers right of rescission. *Central Life Insurance Co. v. Taylor*, 164 Ky. 844.

If a contract between the parties provides the time the property may be returned and a rescission had, then the buyer must return it within the time so fixed by the contract; but if no time is fixed in the contract then the property must be returned by the buyer within a reasonable time, all the facts and circumstances considered. Such is the general rule as shown by the following cases: *Glover Machine Works v. Cook-Jellico Coal Co.*, 173 Ky. 676; *Clark v. Johnson Foundry & Machine Co.*, 19 Ky. L. Rep. 973; *Dick v. James Clark, Jr., Electric Co.*, 161 Ky. 622; *Hauss v. Surran*, 168 Ky. 686; *McCormick Harvesting Machine Co. v. Arnold*, 116 Ky. 508; *Miller v. Gaither*, 3 Bush 152; *Ruby Carriage Co. v. Kremer*, 26 Ky. L. Rep. 274; *International Harvester Co. of Am. v. Brown*, 182 Ky. 435.

If a buyer would rescind he must first place the seller *in statu quo* by returning or offering to return the property. *James Clark, Jr. v. Electric Co.*, 161 Ky. 622; *Hogging v. Bancroft*, 1 Dana 28; 25 Cyc. pp. 148 and 149; *Nicholas & Shepherd v. Stubbs*, 160 Ky. 694; *Dick v. Electric Co.*, 161 Ky. 622.

It appearing that the buyers of the dredge machine allowed it to remain at the place where they had used it and abandoned it and resolved to rescind the trade without returning or offering to return it to the seller for more than two years, and at least ten months after the abandonment in the fields without any fault on the part of the seller or any satisfactory explanation of the unusual delay, we are of opinion that the trial court correctly held the delay so great as to, as a matter of law, bar their right to a rescission of the contract.

In the cases where the property purchased is not a compliance with the terms of the contract, the buyer, if free from fault, may have relief in one of two ways: (1) return the property and sue for a rescission of the contract; or (2) retain the property and sue for damages for breach of the contract. Of course he can exercise only one remedy, and when he elects to have a rescission he can not thereafter have damages for the breach. *Louisville Ry. Co. v. Raymond's Admr.*, 135 Ky. 738; *Roberts etc., v. Moss*, 127 Ky. 657; *The Joseph Goldberger Iron Co. v. The Cincinnati Iron & Steele Co.*, 153 Ky. 20.

Ordinarily in a sale of personal property when there is a breach of warranty the purchaser may return the property and recover the purchase price, or he may recover damages for a breach of warranty, and so in the case at bar. *McCormick Harvesting Machine Co. v. Arnold, etc.*, 116 Ky. 513.

For reasons indicated the judgment is affirmed.

Trustees of Baptist Female College of Liberty Association, et al. v. Barren County Board of Education, et al.

(Decided February 22, 1921).

Appeal from Barren Circuit Court.

1. **Trusts—Termination—Disposition of Property.**—By an act of the General Assembly, a corporation, designated by the name of "Trustees of the Baptist Female College of Liberty Association," was created with power in the trustees "to purchase or receive by donation, devise, or bequest, any lands, tenements, hereditaments, rents, goods and chattels, and to hold the same by the name aforesaid, to them and their successors forever, for the use and benefit of said institution, and according to the intention of the

donor or donors." After the creation of the corporation certain donations were received for the purpose of purchasing land, erecting buildings thereon and building a school. While these donations came principally from Baptists, many of them were received from members of other churches. The school failed and it became necessary to sell the property to pay its debts: Held, that the surplus proceeds, after paying the debts of the institution, did not belong to the liberty association or any of its churches.

2. Statutes—Construction—When Resort May be Had to Statutes from Which Present Statute Was Derived.—In construing a statute whose language is plain and unambiguous, the courts will inquire no further, but if the matter is left in doubt and uncertainty, resort may be had to the original acts from which the statute was derived.
3. Statutes—Colleges and Universities—Religious Societies—Construction of Section 323, Kentucky Statutes.—Section 323, Kentucky Statutes, providing that "if any society holding land shall dissolve, title thereto, with its appurtenances, shall vest in the trustees of the county seminary, or in the county court for the benefit of the common schools," construed in the light of its language and the prior statutes from which it was derived and held to apply only to religious societies, and not to a corporation holding land solely for the benefit of an educational institution.
4. Trusts—Termination—Dissolution of Seminary—Disposition of Property.—Where donations of property are made to trustees to be held by them for the use and benefit of an educational institution, and according to the intention of the donors, and the trust fails, the surplus proceeds, after discharging the debts of the institution, revert to the original donors or their heirs.

E. H. SMITH, S. E. JONES and C. H. HATCHETT for appellants.

BASIL RICHARDSON and W. L. PORTER for appellees.

OPINION OF THE COURT BY JUDGE CLAY—Reversing.

By an act of the General Assembly, approved March 10, 1873, Henry Shoudy and fifteen others were constituted a body politic and corporate, to be known and designated by the name and style of the Trustees of the Baptist Female College of Liberty Association, with all the powers, privileges and rights which are exercised by the trustees of any academy of learning in this state. Chapter 344, Acts 1873, adjourned session, page 436. A majority of two-thirds of the trustees remaining in office were authorized to fill vacancies until the regular annual meeting of the liberty association, which was given the power to fill such vacancies by a majority vote. The liberty association was also authorized at each annual session to elect one-fourth of the trustees. In addi-

tion to the power to elect officers and teachers, fix their salaries and prescribe rules for the government of the institution, certain powers were conferred on the trustees by section 2 of the act, which is as follows:

"That it shall and may be lawful for the said trustees, and their successors in office, and they are hereby invested with full power and authority in their corporate capacity, to purchase or receive by donation, devise, or bequest, any lands, tenements, hereditaments, rents, goods, and chattels, and to hold the same by the name aforesaid, to them and their successors forever, for the use and benefit of said institution, and according to the intention of the donor or donors of any such lands, tenements, hereditaments, moneys, rents, goods and chattels, and not otherwise, and to sell, transfer, and convey the same, by a majority of said trustees, unless prohibited by the terms of any such donation."

After the creation of the corporation, certain donations were received for the purpose of purchasing land, erecting buildings thereon and conducting the school. While these donations came principally from Baptists, many of them were received from members of other churches. The school became indebted from time to time and it was necessary to mortgage the property in order to meet this indebtedness. The school was conducted with varying degrees of success until the year 1912, when the trustees reported to the liberty association that the school was heavily in debt, and that there was no way of paying the debts except to sell the property. Thereupon, the liberty association passed a resolution empowering the board of trustees to sell the college and grounds for the best price obtainable. The trustees then sold the property to the Barren County Board of Education for the sum of \$19,400.00, or more than enough to discharge the outstanding indebtedness.

This suit was brought for the purpose of having the court determine who was entitled to the surplus proceeds. The claimants were the donors, the county court for the use and benefit of the county schools of Barren county, and the liberty association. The chancellor held that the surplus belonged to the common schools of the county. To reverse that judgment, this appeal is prosecuted.

There is no ground whatever for holding that the proceeds of the sale, after discharging the school's indebt-

edness, belong to the liberty association or any of the churches composing that association. While it is true that the school was a Baptist institution and was supported principally by Baptists, and the liberty association had the power to elect the trustees, there is nothing in the act, or conditions accompanying the donations which the trustees were authorized to receive, to indicate that they were for the benefit of liberty association or any of its churches. On the contrary, section 2 above quoted, makes it clear that all donations, devises or bequests, which the trustees were authorized to receive, were to be held by them "for the use and benefit of said institution, and according to the intention of the donor, or donors, of any such lands, tenements, hereditaments, moneys, rents, goods and chattels, and not otherwise."

The next question for decision is whether the judgment awarding the surplus proceeds to the county court for the benefit of the common schools was proper. The judgment was based on section 323, Kentucky Statutes, which is as follows:

"If any society holding land shall dissolve, the title to such land and appurtenances shall vest in the trustees of the county seminary in which the land may lie, for the use of such seminary; and if there be no such seminary, then in the county court, for the benefit of common schools in the county. The provisions of this chapter shall not apply to the society called Shakers, who shall have the same right to acquire and hold real estate as they have had prior to the passage of this law."

The statute of 43rd Elizabeth in reference to charitable uses was in force in Kentucky.

In the year 1814, the General Assembly passed an act for the benefit of religious societies in this commonwealth. 5 Litt. 131; Digest Statute Laws Kentucky of Morehead & Brown, 1834, Vol. 2, p. 1347. Said act is as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky: That if any society or sect of Christians in any part of this Commonwealth, shall heretofore have associated, or hereafter shall associate themselves together, in congregational form, and shall have acquired, or hereafter shall acquire, a piece or lot of ground, for the purpose of erecting thereon a house or houses of worship, graveyard, and pound for horses; and shall have heretofore received, or shall hereafter

receive, the title of said ground, by devise, or conveyance to trustees for the use and benefit of said society or congregation, and it shall become necessary, by reason of the death or removal of said trustees, or through any other cause, to appoint new trustees to support the legal estate, it shall and may be lawful for said society or congregation, by the election held by its members, or by those appointed for that purpose, according to the rules of said society, to elect or appoint, as often as may be necessary, any number of trustees not exceeding five; and to produce the names of said trustees so elected or appointed, to the county court of the county where the house of worship may be situated; who shall order the said names to be entered on their records; and thereupon, said trustees, so elected or appointed, shall be vested with the legal title of said land, for the use and benefit of said congregation; and shall have power to do any legal act in conducting the same which may be necessary for the uses aforesaid; and to maintain any action or actions of trespass, or other action for the safe keeping and preservation of said property, which may be necessary for that purpose:

“Provided, however, that if any schism or division shall take place in said congregation or church, from any other cause than the immorality of its members, nothing in this act shall be so construed as to authorize said trustees to prevent either of the parties so divided, from using the house or houses of worship, for the purposes of devotion, a part of the time, proportioned to the numbers of each party:

“Provided, that the quantity of real estate hereafter acquired by any religious society, and vested in trustees and their successors under this act, shall not exceed (four acres of land): Provided, that nothing in this act shall be construed to authorize the minority of any church having seceded from, or been expelled, or excommunicated from the church or congregation, from interfering in any manner, in their appointments for preaching or worship, with any appointment for similar purposes, which may have been made by the body or the major part of such church or congregation.”

In the year 1824, the legislature passed an act to amend an act entitled “An Act for the benefit of religious societies in this Commonwealth,” approved February 1, 1814. This act was approved January 7, 1824, and

may be found on page 1348, Morehead & Brown, *supra*. This act is as follows:

“Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky: That any religious society heretofore formed, or which may hereafter be formed, may acquire by purchase or donation any number of acres of ground not exceeding ten, in one or more lot or lots, under the same rules, regulations and restrictions contained in the above recited act, and for the purposes therein mentioned; and so much of the above recited act as restricts any religious society from holding more than one lot of ground, be and the same is hereby repealed; Provided, however, that this act shall not be construed to authorize any society to hold more than ten acres.

“Sec. 2. Be it further enacted: That if any society so holding lands shall dissolve, the said land and appurtenances shall be vested in the trustees of the seminary of learning of the county where such land may be, for the use and benefit of said seminary; and if there be no seminary in said county, then and in that case the land and appurtenances shall be vested in the county court, for the use of common schools in said county.”

The statute of 43rd Elizabeth and the foregoing acts were subsequently revised and embraced in one chapter by the commissioners appointed for that purpose, and constitute chapter 14, Revised Statutes of Kentucky, 1852, by Wickliffe, Turner and Nicholas, which chapter is as follows:

“Sec. 1. All grants, conveyances, devises, gifts, appointments, and assignments, heretofore made, or which shall be hereafter made, in due form of law, of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, moneys, stocks, or choses in action, for the relief or benefit of aged or impotent and poor people, sick and maimed soldiers and mariners, schools of learning, seminaries, colleges, universities, navigation, bridges, ports, havens, causeways, public highways, churches, houses of correction, hospitals, asylums, idiots, lunatics, deaf and dumb persons, the blind, or in aid of young tradesmen, orphans, or for the redemption of prisoners or captives, setting out of soldiers, or for any other charitable or humane purpose, shall be valid, except as hereinafter restricted.

"Sec. 2. No charity shall be defeated for the want of a trustee or other person in whom the title may vest; but courts of equity may uphold the same by appointing trustees if there be none, or by taking control of the fund or property, and directing its management, and settling who is the beneficiary thereof.

"Sec. 3. No church or society of Christians shall be capable of taking or holding the title, legal or equitable, to exceeding fifty acres of ground; but may acquire and hold that quantity for the purpose of erecting thereon houses of public worship, public instruction, a parsonage, a graveyard and a horse pound.

"1. The society may, before or after the creation of the charity, appoint not exceeding three trustees, who and their successors, shall be vested with the title, legal or equitable, to such property, for the use of such society.

"2. The society shall enter such appointment on its record book, a majority concurring therein, and may fill vacancies in like manner.

"3. The trustees, or a majority of them, may, in their own names, for the use of the society, institute and prosecute suits to recover any property, real or personal, to which society has right, and may defend any suit that shall be instituted against the trustees, or society, for or touching its temporalities.

"4. In case a schism or division shall take place in a society, the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportioned to the members of each party.

"5. The excommunication of one party by the other, shall not impair such right, except it be done, *bona fide*, on the grounds of immorality.

"Sec. 4. If any society holding lands shall dissolve, the title to such land and appurtenances shall vest in the trustees of the county seminary in which the land may lie, for the use of such seminary; and if there be no such seminary, then in the county court, for the benefit of common schools in the county. The provisions of this section shall not apply to the society called Shakers, who shall have the same right to acquire and hold real estate, as they have had prior to the passage of this act."

The present statute was enacted May 12, 1893, and embraces sections 317 to 324, inclusive, Kentucky Stats. Section 317 is the same as section 1, Revised Statutes of 1852, with the exception that the words, "if the grant,

conveyance, devise, gift, appointment or assignment shall point with reasonable certainty the purposes of the charity and the beneficiaries thereof," are inserted between the word "valid," and the words "except as hereinafter restricted." Section 318 is the same as section 2 of the revision. Section 319 is the same as section 3 of the revision. Section 320 is the same as subsections 1 and 2, section 3, of the revision. Section 321 is the same as subsection 3, section 3, of the revision. Section 322 is the same as subsections 4 and 5, section 3, of the revision. Section 323 is the same as section 4, of the revision. There is nothing in the revision corresponding to section 324, which merely confers on the circuit court of the county in which the real estate is held the power to adjudge a sale thereof for the purpose of reinvestment in similar property.

Manifestly, if the corporation, "Trustees of the Baptist Female College of Liberty Association," is not a society within the meaning of section 323, *supra*, then its real estate, upon the dissolution of the corporation, would not vest in the county court for the benefit of the common schools. That being true, the case turns on the proper meaning of the word, "society." Of course, if its meaning in the present statute, which is a substantial re-enactment of the revision of 1852, is plain and unambiguous, our inquiry should stop there, but if the matter is left in doubt and uncertainty, we may properly resort to the original acts from which the present statute was derived. *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Doyle v. Wisconsin*, 94 U. S. 50, 24 L. Ed. 64. Looking at the present act we find that section 319 (section 3 of the revision) provides that "no church or society of Christians shall be capable of taking or holding the title, legal or equitable, exceeding fifty acres of ground, etc." That section, of course, is limited to a society of Christians. Following this section we find other sections relating to schisms and excommunications which could only occur in churches or religious societies. Then follows section 323, providing that "if any society holding land shall dissolve, the title to such land or appurtenances shall vest, etc." In view of these provisions, it would seem that section 323 was limited to religious societies. However, if the matter be regarded as doubtful, the original acts, from which the present statute was derived, show very plainly what was the purpose of the

legislature. The act of 1814, which was "for the benefit of religious societies in this Commonwealth," gave to any such society the right to acquire not exceeding four acres of land for the purpose of erecting thereon houses of worship, grave yards and pounds for horses, and contained other provisions in regard to schisms, etc. The act of 1814 was amended by the act of 1824. Section 1 of the latter act provided in substance that any religious society might acquire not exceeding ten acres. Then followed section 2, providing "if any society so holding land shall dissolve, the said land and appurtenances shall be vested, etc." Manifestly, the word "society," in section 2, referred only to the societies mentioned in section 1, that is, religious societies. Section 323, Kentucky Stats., was derived from, and is the same as, section 2, act of 1824, with the exception of the provisions in regard to Shakers. These circumstances confirm our conclusion that the word "society" in section 323 is limited to religious societies. Here, the real estate was not owned by the liberty association or any of the churches composing that association. The title was in the trustees of the Baptist Female College of Liberty Association, and was held by the trustees for the benefit of the institution, and not for the benefit of any religious society. Not being a religious society, the real estate belonging to the corporation did not, upon its dissolution, vest in the common schools. On the contrary, the case is one where the donations were made to the trustees to be held by them for the use and benefit of the institution and according to the intentions of the donors, and the trust having failed, the surplus proceeds, after paying the debts of the institution, reverted to the original donors or their heirs, in accordance with the rule laid down in *Taylor v. Rogers*, 130 Ky. 112, 112 S. W. 1105.

The case of *Stanford College v. Board of Education*, 145 Ky. 838, 141 S. W. 386, in so far as it announces a contrary doctrine, is hereby overruled.

Wherefore the judgment is reversed and cause remanded for proceedings not inconsistent with this opinion.

Whole court sitting.

Webb, et al. v. Webb, et al.

(Decided February 22, 1921).

Appeal from Letcher Circuit Court.

1. **Appeal and Error—Objections to Method of Supplying Lost Record—Waiver—Failure to File Exceptions.**—The regularity of the method adopted for the purpose of supplying lost papers below can not be questioned for the first time on appeal, where the parties complaining had an opportunity to except below, but failed to do so.
2. **Infants—Service—Sufficiency.**—Where the petition which was sworn to showed that their father was dead and that their mother was their guardian, service on the mother of a copy of a summons addressed to the mother and her infant children under fourteen years of age was sufficient under Civil Code of Practice, section 52, to bring the infants before the court, notwithstanding the fact that the officer's return did not show that the summons was served on the mother as the guardian and mother of the infant children, and notwithstanding the fact that a separate copy for each infant was not served on her.
3. **Appeal and Error—Objections to Depositions—Infants—Waiver—Failure to File Exceptions.**—An objection that depositions were taken without notice is waived by a failure to file exceptions on that ground and can not be raised for the first time on appeal, and this rule applies not only to adults, but to infants who were represented by a guardian ad litem.
4. **Depositions—Manner of Taking—Interrogatories.**—Civil Code of Practice, section 574, requiring depositions to be taken on interrogatories when all the parties against whom it is to be read be defendants under disability other than coverture, or infancy and coverture combined, does not apply where one of the defendants is an adult.
5. **Deeds—Cancellation.**—A father conveyed land to his son in consideration of support. The son died. The father brought suit against his son's widow and children to cancel the deed: Held, that as the sole object of the suit was to set aside the deed, and not to subject the son's estate to any personal liability, it was not necessary to make the son's administrator a party to the suit.

W. G. DEARING, ROBERT H. BLAIR and FRENCH HAWK for appellants.

HAYS, SALYER & BAKER, E. C. O'REAR and J. C. JONES for appellees.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

In the year 1892, E. T. Webb and wife conveyed to their son, J. J. Webb, a tract of land in Letcher county,

in consideration of the latter's agreement to take care of and provide for them as long as they lived. In the year 1904, J. J. Webb died, leaving a widow, Liza Webb, who afterwards married John D. Fugate, and three children, Lula Webb, Joda Milton Webb and Royn Edward Webb, all of whom were under the age of fourteen years.

On April 28, 1905, E. T. Webb brought suit against the widow and infant children of his son to set aside the deed on the ground that his son had failed to comply with his agreement to take care of him and his wife, and that, after his death, his widow and children were unable and had failed to comply with the agreement. On the day the suit was filed, a summons was issued for each of the defendants and returned by the sheriff as follows: "Executed by delivering each of the within defendants a true copy of this summons, this May 1, 1905." On August 31, 1905, R. M. Fields was appointed guardian *ad litem* for the infant defendants. He filed his report on September 5, 1905. Thereafter, other process was issued and served on the infants, but in view of the conclusion of the court, it is unnecessary to set out the return or to pass on its sufficiency. Proof was taken and on submission of the case there was a final judgment cancelling the deed. Thereafter, E. T. Webb sold the land to S. E. Adams, and in the month of January, 1915, the infant defendants made a motion to set aside the judgment on the ground that the guardian *ad litem* was appointed and filed his report before they were served with process, and that the guardian *ad litem* made no report after they were summoned.

Thereafter, the papers were lost and an order was entered directing the master commissioner to supply the lost papers. Later on a report was filed in the name of the master commissioner by Stephen Combs, Jr., deputy master commissioner of the Letcher circuit court, stating in substance that he had held a sitting for the purpose of supplying the papers, and that W. G. Dearing had presented to him what purported to be a true copy of the entire record which was lost, and made an affidavit that the same was a true copy of all the papers in the case, and that he found the papers so presented to be true copies of the ones lost and sought to be supplied. It was ordered that the report lie over for exceptions, and none having been filed, the report was subsequently confirmed by an order of court.

The motion to set aside the judgment was overruled and from this order, as well as from the judgment itself, the defendants, who were still infants, prosecuted this appeal.

Appellees not only moved to strike from the transcript certain portions of the record originally filed, but objected to the filing of a supplemental record, on the ground that the record which was lost was not supplied in the manner provided by law. In reply to this contention it is sufficient to say that the regularity of the method adopted for the purpose of supplying lost papers below can not be questioned for the first time on appeal, where the parties complaining had an opportunity to except below, but failed to do so.

The chief complaint of appellants is that the judgment was void because the infant defendants were not properly served with process. Section 52, Civil Code, provides: "If the defendant be under the age of fourteen years the summons must be served on his father, or, if he have no father, on his guardian; or, if he have no guardian, on his mother, or, if he have no mother, on the person having charge of him." In the case of *Rodgers v. Rodgers*' Adm'r, 17 R. 358, 31 S. W. 139, process was executed as follows: "Executed April 12, 1892, on Sophia Rodgers, Cathie Rodgers, Mary Rodgers, and Annie Rodgers, by giving to each of them a copy of this summons." Annie Rodgers was the mother of the infants, Sophia Rodgers, Cathie Rodgers and Mary Rodgers, and their father was dead. In holding the service good, the court said:

"Here the petition showed that the father was dead; and, while it did not show that they had no guardian, yet it showed that Annie Rodgers, who was also made a defendant by the same pleading, and summoned with them, was their mother. It is true that the return shows that a copy of this summons was unnecessarily delivered to each of the infants, and that it fails to show that the copy delivered to Annie Rodgers was delivered to her as their mother. Still, we are of the opinion that, within the reason and spirit of previous adjudications of this court, the service of the summons as shown by this return was good against these infants. Referring to the provision of the Code requiring service upon the father or other person standing in this relation to the infant, this court has said: "Undoubtedly, the object of this provision was to bring notice to one who would naturally feel enough interest in the infant to see that his rights were protected. The pur-

pose of a summons is to give notice. In the case now in hand, while the father of the infant was a party to the suit, yet the return on the summons does not show that it was served on him as the father of the infant defendants. It was executed on him as a party to the suit. But, considering the reason for the rule furnished by the Code, why was this not sufficient as to the infants?

"They, together with the father, were named in the copy of the summons that was delivered to him, as defendants. He was thereby notified that they had been sued. There was no need of delivering a second copy of the summons to him as their father. The reason for the law had been fulfilled, and its object accomplished, as fully as if he had not been a party to the action, and a summons had been delivered to him as the father of the infants." *Cheatham v. Whitman*, 86 Ky. 618, 6 S. W. 595. And, again, in a case involving this question, it is said, in enumerating and passing upon the grounds relied on by a purchaser for refusing to accept a title: "Fifth. Because it is not stated in the service of the summons served on the appellant, as the mother and custodian of the infant defendants, that she was their mother and custodian. The petition shows that she was their mother and custodian, and we must presume, in the absence of anything to the contrary, that the officer followed the direction of the petition as to the proper person to serve, etc. Besides, it is clear that she was the proper person to be served." *Bailey v. Fanning Orphan School* (Ky.), 14 S. W. 908. Within the principles laid down and clearly deducible from these cases, we are of opinion that the service of this summons on the mother of these infants, although the officer's return does not show that it was served on her as their mother, was sufficient to bring them before the court."

The process was directed against Liza Webb, Lula Webb, Joda Milton Webb and Royn Edward Webb. Here, the petition which was sworn to showed that J. J. Webb, the father of the infant defendants, was dead, and also that Liza Webb was not only their mother, but their guardian. Under these circumstances, the delivery of the copy of the summons to her was sufficient to bring the infants before the court, notwithstanding the fact that the officer's return did not show that the summons was served on her as the guardian of the infant children, and notwithstanding the fact that a separate copy for each infant was not served on her.

Another objection to the judgment below is that it was based on evidence contained in depositions taken without proper notice. The certificate of the examiner states that the depositions were taken "Pursuant to a notice hereto attached." The notice was addressed not only to all the defendants, but also to R. M. Fields, the guardian *ad litem* of the infant defendants. The papers were lost and reproduced in the manner above referred to. It is by no means probable that the notice to take depositions was not properly served. In supplying the original record, the endorsement showing the filing of the petition was overlooked, and for the same reason the endorsement on the notice to take depositions may have been overlooked. But, however this may be, it is well settled that under Civil Code Practice, sections 586-588, an objection that depositions were taken without notice is waived by a failure to file exceptions on that ground, and can not be raised for the first time on appeal, and this rule applies not only to adults, but to infants who were represented by a guardian *ad litem*. *Rothchild v. Wallace, et al.*, 155 Ky. 676, 160 S. W. 170.

The judgment is also attacked on the ground that the depositions were not taken on interrogatories as required by section 574, Civil Code. We have often written that that section does not apply to infant defendants unless all of the defendants are infants. Here, the depositions were to be read not only against the infant defendants, but against their mother, who was an adult and a necessary party. That being true, it was not necessary to take the depositions on interrogatories. *Sears v. Collie*, 148 Ky. 444, 146 S. W. 1117.

Another contention is that J. J. Webb's administrator was not made a party to the suit. The purpose of the suit was not to subject J. J. Webb's estate to any personal liability. Its sole object was to set aside the deed. There is nothing in the record to show that the administrator or any creditors were interested in the question. Under these circumstances, the administrator was not a necessary party, and the fact that he was not a party in no wise prejudiced the rights of appellants.

Judgment affirmed.

Whole court sitting.

Polley v. Ford.

(Decided February 22, 1921).

Appeal from Pike Circuit Court.

1. **Logs and Logging—Sales and Conveyances of Standing Timber.**—The provision in a deed conveying "saw log timber" on a described tract of land, that the grantor gives to the grantee, over other lands of the grantor, "the full right of way to haul and cut all of said timber, a good and sufficient road to haul on, corn and anything else, down said creek to the river," was a mere license to the grantee to use the passway while getting out the "saw log timber," which was the chief subject of the conveyance.
2. **License—In Respect of Real Property.**—A license as applied to lands is an authority to do a particular act or series of acts upon the land of another without possessing any estate therein.
3. **Logs and Logging—Sales and Conveyance of Standing Timber.**—The conveyance of the "saw log timber" on a described tract of land means such as is "saw log timber" at the date of the conveyance, and does not include any that may thereafter become "saw log timber" either by the growth of the timber or the changed conditions in the lumber market.
4. **Logs and Logging—Removal of Timber—Express Grant.**—As no time was fixed for the removal of the timber, and it was contemplated that the same was to be promptly removed, as the conduct of the parties showed, the law will imply an obligation to remove it in a reasonable time; and as the right to the passway only existed for the purpose of removal, that right also expired with the expiration of the reasonable time.

STRATTON & STEPHENSON for appellant.

ROSCOE VANOVER for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

In February, 1896, James Polley owned a tract of land in Pike county at the mouth of Powell's creek, including a public road running parallel with the Big Sandy river and the land between the county road and the river. He also owned some timber lands higher up on Powell's creek, as did also the appellee, John W. Ford.

The appellant, D. C. Polley, is the successor in title of James Polley to the farming lands between the county road and the river.

In February, 1896, James Polley and John W. Ford made an exchange of timber on certain lands owned by

them on Powell's creek, and Polley, on the 6th of February, 1896, conveyed to Ford:

"All the saw log timber on all the land below the conditional line deeded to John W. Ford by James Polley and wife on Powell's creek, a tributary of Sandy river in Pike county, Ky., it being the land deeded by John W. Powell to James Powell and John W. Ford, the party of the first part hereby gives the party of the second part the full right of way to haul and cut all of said timber, a good and sufficient road to haul on, corn and anything else, down said creek to the river."

Thereafter for some years, Ford, in getting out the timber, used a roadway over the bottom lands of Polley from the county road to the river, as did Polley himself in getting out some timber from up that stream.

Some years ago, D. C. Polley, the present owner, fenced up the passway leading from the county road across his farming lands, and in September, 1918, Ford brought this equitable action, relying upon the deed quoted, and asked the court to establish for him a permanent passway for all purposes, which the circuit court in its judgment did, and D. C. Polley has appealed.

The only question involved is an interpretation of that deed in so far as it gives a right of way to Ford; that is, to determine whether it was a grant of a permanent passway for the hauling of saw logs and for all other purposes which would be appurtenant to the land of Ford lying higher up the creek; or whether, considering the situation of the parties, and the nature of the conveyance, and what was contemplated in the conveyance, it was a mere license to Ford to use that passway while getting out the "saw log timber," which was the chief subject of the conveyance.

It will be observed that Polley did not convey in this instrument any land to Ford but only the "saw log timber" on a prescribed tract; in other words, he conveyed to him only a certain part or interest in the tract of land, which when detached therefrom became personalty, and then there is provided a manner by which that personal property may be conveniently gotten to the river and thence to the market.

Let us consider the situation of these parties. Ford and Polley each owned timber lands containing "saw log timber" on Powell's creek; they made an exchange of timber and they each desired to get their timber to the river in the most convenient way, so that it might go to

market, and they each did shortly thereafter get out that timber and transport it to the river and each used the passway across Polley's bottom land. Polley knew when he gave this right of way to Ford that it would also be convenient for himself; it was clearly contemplated by the parties that the "saw log timber" involved would be removed from the land and transported to the river in a reasonable time, and the right of way was given by Polley not only to facilitate the operation for Ford in getting out the "saw log timber" conveyed to him, but in getting out his, Polley's, own saw log timber.

In the light of these circumstances and conditions, is it reasonable to suppose that Polley intended to convey over his farming lands a perpetual right of way to Ford for all purposes, which would become appurtenant to and attach to the land that Ford owned up Powell's creek? On the contrary, is it not much more reasonable to assume, in the light of the timber operations which they both then contemplated, that Polley intended only to give to Ford a license to use his farming lands for a right of way while he was getting out the "saw log timber" he was then conveying him, he, Polley, at the time expecting to use the same roadway in connection with Ford's use of it?

Polley had conveyed to Ford no land to which this right of way could be permanently appurtenant, but he had conveyed to him certain saw log timber which made the right of way temporarily valuable to Ford.

A license as applied to lands has been defined to be "an authority to do a particular act or series of acts upon the land of another without possessing any estate therein." *East Tennessee Telephone Co. v. Paris Electric Co.*, 156 Ky. 762.

Applying that definition of a license to the language used in the instrument involved, and taking into the estimate the situation of the parties and their purposes at the time, it is fairly apparent that it was a license for a specified purpose which Polley gave to Ford.

But it is said that the right given to haul "corn and anything else" is inconsistent with this view, but we do not so construe it. The hauling of corn and other feed for stock, as well as the hauling of provisions to feed men, is necessary in the getting out of timber on a large scale, and it was evidently in the minds of the parties that such things might be hauled over this right of way.

The conveyance of the "saw log timber" meant only such timber as was "saw log timber" at the date of the conveyance, and does not include any that has become "saw log timber" since, either by the growth of the timber or by the changed conditions in the lumber market; and as the contract fixed no time in which the timber was to be removed or the passway to be used for that purpose, and it was contemplated that the timber was conveyed for immediate removal, as the conduct of the parties shows, the law implies that it is to be done in a reasonable time. And surely from 1896 to 1918, when this suit was brought, is more than a reasonable time. *Evans v. Dobbs*, 112 S. W. 667.

Our interpretation of the instrument involved is that it gave to Ford only a license to temporarily use the bottom lands of Polley for a reasonable time while he, Ford, was getting the saw log timber conveyed to him by Polley to the river for transportation to market.

The judgment is reversed with directions to dismiss the plaintiff's petition.

Thurmond v. Thurmond.

(Decided February 22, 1921).

Appeal from Boyle Circuit Court.

1. Wills—Limitation Over.—A limitation over, after the grant of a fee simple estate is void.
2. Wills—Restraint Upon Alienation.—After a devise of a fee simple estate, an attempt to restrain its alienation, during the entire life of the devisee is void.
3. Wills—Presumption Against Intestacy.—The presumption against intestacy, partial or whole, is not indulged, nor can the rule which favors the vesting of estates be invoked, when overcome by the plainly expressed intent of a testator to do otherwise.
4. Wills—Intention of Testator.—The character of an estate devised to a devisee, by a will must be determined by an ascertainment of the intention of the testator, which must be arrived at, by a consideration of the entire will, and effect must be given to every part of it, where it is possible to do so.
5. Wills—Limitation Over.—A limitation over after a life estate is valid, and where a life tenant is granted the power to dispose of the property a valid limitation over may be made of any of the

estate which may remain undisposed of at the death of the life tenant.

CHAS. C. FOX for appellant.

CLARENCE WOOD for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.

The appellant, Amelia R. Thurmond, who previous to her marriage was Amelia I. Robards, sought by this action a construction of the last will and testament of her mother, Mary D. Robards, and therein insisted that under the terms of the will she was devised the fee simple in a certain farm, which she has since sold, as authorized by the will, and invested the proceeds in the purchase of another farm, and that she is now owner with a fee simple title of the latter farm. The court adjudged that the will devised to her a life estate only in the farm mentioned in the will, with the power to sell and convey same, but was required to reinvest the proceeds of the sale in other real estate, to be held by her as a home, upon the same terms under which she held the farm which she sold, and that the purchaser from her of the farm was required to see that the purchase money paid by him was so applied, and that the remainder interest in the farm was owned by her infant son, William Hunton Thurmond, and such other children as may be hereafter born to her, if any, but if such son or any other child, which may hereafter be born to her, should die in the lifetime of the mother, his or their interest would be defeated. From this judgment she has appealed and the one question for determination is the nature of the estate which was devised to her by the will.

The testatrix after, by the first clause of the will, having directed the payment of any debt which she might owe, and her funeral expenses, made a disposition of her property by the second clause of the will which is as follows:

“Item 2nd. I give and bequeath all of the residue of my real and personal property to my beloved daughter, Amelia I. Robards, which consists of a farm in Boyle county and bank stock and other property. She is to hold and have said farm, so that she may never be without a home, she may sell the same, but if she does so she and the purchaser will be required to *revest* the proceeds at

the sale of same in other real estate, to be held by her as a home, it being my purpose to secure for her in real estate a home and a support out of same, so long as she lives, at her death said real estate shall go and pass to any children she may have living at her death and she shall have the entire use and income from said real estate."

The remaining clause of the will provided for the appointment of an executrix and nothing more.

The contentions made for appellant are that the first sentence of the second clause of the will devised to her the unqualified fee in the farm, and therefore the remainder of the clause is to be regarded as void, because it is an attempt to qualify the fee and to lessen the estate already devised to her, and, also, contains an attempt to create a limitation over to her children of an estate in remainder, when the entire estate having been devised to her there was nothing to limit over. It is also contended that the clause after the first sentence is void, because it is an attempt to impose an unreasonable restraint upon her power of alienation of the fee devised to her, as she is by the terms of the clause restrained from alienating the farm during her entire lifetime, except for the purpose of re-investing the proceeds arising from a sale of it in other lands to be held upon the same terms. There could be no doubt of the soundness of these contentions, if the will, in fact, devised to appellant the land in fee simple. In such case there could be no estate to be limited over upon a fee as a fee simple is the entire estate and when given there is nothing further to be given, and the familiar principle that a limitation after a fee simple is void, would control the construction of the will. *Close's Adm'r v. Close*, 118 S. W. 980; *Williams, et al. v. Neal's Guardian*, 105 S. W. 951; *Trustees, etc. v. Mize*, 181 Ky. 567; *Nelson, et al. v. Nelson, etc.*, 140 Ky. 410; *Barth v. Barth*, 38 S. W. 511; *Becker v. Roth*, 132 Ky. 429; *Radford v. Fidelity, etc.*, 185 Ky. 453; *Dills v. Adams*, 19 K. L. R. 1169; *Irvin v. Putnam*, 89 S. W. 581. Likewise if appellant was devised the fee in the land, she might properly be restrained from alienating it for a reasonable period of time, but an attempt to restrain its alienation by her during her entire lifetime would be an unreasonable restraint and repugnant to the ownership of a fee, and therefore void. *Harkness v. Lisle*, 132 Ky. 767.

The above principles must be accepted as sound in any state of case to which they are applicable, but, neith-

er is applicable, if the estate devised to appellant was a mere life estate in the land, instead of a fee, as contended. The question, which arises first, in every case, is whether the estate devised to the first taker is a fee or a life estate, and this must first be determined before the principles, which apply can be invoked. Plaggenborg, et al. v. Molendyk's Adm'r, 187 Ky. 509. This determination must be made from an ascertainment of what the maker of the will intended upon that subject, and the intention of the maker of the will can be ascertained only from a consideration of the entire instrument. All rules of construction must give way to this primary principle. Adair v. Adair, 3 K. L. R. 857; Howard v. Cole, 124 Ky. 812; Diggs v. Plunkett, 32 K. L. R. 390; Cook v. Hart, 135 Ky. 650; United States, etc. Company v. Douglas' Trustee, 134 Ky. 374; Barber v. Baldwin, 138 Ky. 710; Ferran & Co. v. Fidelity Trust Co., 138 Ky. 70; Watkins v. Bennett, 170 Ky. 469; Anderson v. Hall, 80 Ky. 91; Bayless v. Prescott, 79 Ky. 252; Buschmeyer v. Klein, 139 Ky. 124; Thackston v. Johnston, 84 Ky. 210; Carroll v. Cave Hill Cemetery Co., 172 Ky. 111; Harding v. Harding, 170 Ky. 740; Radford v. Fidelity, etc. Co., 185 Ky. 460. In construing a will it is likewise imperative to give effect to every part of it and every provision of it, if it is possible to do so. Deskins v. Williams, 32 K. L. R. 539; Allen v. Allen, 32 K. L. R. 1157; Patrick v. Patrick, 135 Ky. 307; Duncan v. Berry, 142 Ky. 178; Morse v. Cross, 17 B. M. 735; Coates v. L. & N. R. R. Co., 92 Ky. 263; Peynardo v. Peynardo, 82 Ky. 52. All the clauses of a will relating to the same subject must be considered together in determining the testator's intention. Loy v. McClister, 141 Ky. 800; Duncan v. Berry, *supra*. How much more imperative it must be in arriving at the intention of a testator that all the sentences of the same clause of a will should be read and considered together, especially where there is but one clause of the will which relates to the subject under consideration and the language of that clause relates solely to the disposition of her real and personal property?

With the above seasoned principles in view, we conclude that the testatrix intended to devise her entire personal estate to appellant, absolutely and in fee simple. She expressly says so in the first sentence of the second clause of her will, and nowhere undertakes to limit or modify the devise. By the same sentence, if it stood

alone and without any further provisions in regard to the estate devised to the appellant, there would be an absolute devise in fee of the farm, but the testatrix did not intend that that one sentence should contain all the conditions and limitations of the gift. She immediately follows the first sentence in the same clause with language by which she explains and declares what she means and intends by the language of the first sentence. If she intended to devise the fee in the lands, as she did her personal estate, it was unnecessary to say more than was said in the first sentence, but what immediately follows is as if added by way of proviso, or other proper method of statement by which to describe the gift she had made, and surely all she said relating to the same subject and in the same clause must be considered together. Any other view would be repugnant to the usual and customary manner of expressing purposes and intentions in language and would set up an arbitrary rule for construction, which would as often defeat the intentions of a testator as it would give them effect. By the remainder of the clause the testatrix in effect says that what I meant and intended by what I said in the first sentence, so far as it relates to the farm, is that the appellant shall hold and have said farm "and shall have the entire use and income" from it, "so long as she lives" but "at her death said real estate shall go and pass to any children she may have living at her death." The appellant is also empowered to sell the farm and convey the title, but not absolutely, but upon condition that the proceeds are invested in real estate to be held upon the same terms, and the purchaser must look to the application of the proceeds. The reasons given for the disposition is the desire of the testatrix to provide appellant with a home and support "as long as she may live," together with the purpose, that at the death of appellant the land should pass to such children as she might then have living. To accede to the construction contended for by appellant would necessarily require that all that is said by the testatrix, touching her intentions in regard to the land, should be ignored, except what is contained in the first sentence, which she uses. We know of no rule which would justify this, unless from a consideration of the entire will, it appeared that the testatrix intended to devise to appellant a fee simple estate and not a life or lesser estate. When all of the second clause is read and considered together, and the effect intended is given to each part of it, it is clear that

the appellant was devised a life estate, only, in the farm with remainder over to her children who might be living at the time of her death.

It is insisted, that, if it is held, that the appellant has only a life estate in the farm with the remainder interest limited over to such children, as she may have living at her death, the interest of the child or children, in enjoyment, depending upon the contingency of their outliving the mother, that in the event of the death of the life tenant without any children then living, who could take the remainder, there would be a failure to dispose of the entire estate by the will, contrary to the presumption indulged, when one makes a will, and for such reason it should be held that a fee was devised to the first taker, under the rule that the law favors the vesting of estates, and when a will is made, a presumption against intestacy, is indulged and hence when a will is susceptible of two constructions, that should prevail which disposes of the entire estate. There is no doubt that such principle may be properly invoked where the susceptibility of two constructions exists. *Howard v. Cole*, 124 Ky. 812; *Wood v. Wood*, 127 Ky. 114; *Newcomb v. Fidelity Trust Company*, 33 K. L. R. 41; *Deppen v. Deppen*, 132 Ky. 755. This rule, however, is a rule of construction only, and can be invoked only to aid the interpretation of a will where the intention of the testator is conveyed in uncertain and ambiguous terms, and has no place where the presumption against partial intestacy is overcome by the plainly expressed intention of the testator to do otherwise, as exists in the will under consideration, or is necessarily implied from the language made use of. *Walter v. Neafus*, 136 Ky. 756; *Watkins v. Watkins*, 120 S. W. 341; *Thomas v. Thomas*, 33 K. L. R. 700; *Hackney v. Tucker*, 121 S. W. 417. There is no ground upon which it can be successfully contended that the will in the instant case is susceptible of any construction, except that it gives to the first taker a life estate and no more, and limits the remainder interest over to the children of the first taker who may be alive at her death.

The estate devised to appellant being a life estate, the limitation over of an estate in remainder to her children is a valid one. Where a life estate, only, is given, although with a power of disposition in the life tenant, a limitation over of such of the devised property as should remain undisposed of at the death of the life tenant is

valid. The principle that a limitation over after a gift of a fee simple is void, but that a limitation over after a life estate is valid, is illustrated in its various applications, not only by the cases heretofore cited, but by the following: *Phelps v. Stoner's Adm'r*, 184 Ky. 466; *Commonwealth v. Stoll's Adm'r*, 132 Ky. 237; *Clay v. Chenault*, 108 Ky. 77; *Dulaney v. Dulaney*, 25 R. 1659; *Ball v. Hancock*, 82 Ky. 107; *Mitchell v. Campbell*, 94 Ky. 347; *Moore v. Webb*, 2 B. M. 282; *Lee v. Moore*, 93 S. W. 911; *McCullough's Adm'r v. Anderson*, 90 Ky. 126; *Pedigo's Ex'tr v. Botts*, 28 R. 196; *Payne v. Johnson*, 95 Ky. 175. Hence, the limitation over in the instant case is valid and it is unnecessary to determine upon this appeal the character of estate taken by the remaindermen, but suffice it to say that only such children of the life tenant, as may be alive at her death, will be capable of taking the remainder.

The judgment so far as it adjudges that appellant has a life estate only in the farm with the power to sell it and to reinvest the proceeds in other real estate, under the conditions prescribed by the will, and to be held upon similar terms, is therefore affirmed.

Naylor v. Thomas, Trustee, Etc.

(Decided February 22, 1921).

Appeal from Fulton Circuit Court.

1. **Executors and Administrators—Purchaser of Property at Own Sale.**—It is well established as a general rule that an executor or administrator can not become the purchaser at his own sale of the property of his decedent. The rule precludes the representative not only from purchasing outright, whether for himself or as agent for another, but also from being interested in a purchase at a sale by him made by another for him. And the rule applies whether the sale be by judicial decree or under a power of sale conferred upon the fiduciary by a will or other instrument of writing.
2. **Executors and Administrators—Purchase of Property at Own Sale.**—The reason supporting the rule is, that to permit the fiduciary having the control and power to dispose of the trust property to purchase it from himself, would allow him to create in himself an interest opposite to that of the party or parties for whom he acts, and also a conflict between the self interest and integrity of the fiduciary, thereby furnishing both motive and opportunity for his profiting upon his relations to the property as a trustee to the disadvantage or loss of those it is his duty to protect.

3. **Executors and Administrators—Purchase at Own Sale.**—This rule applies not only to sales at which the executor or administrator becomes the purchaser of his decedent's property, but likewise to all sales of such property where the purchaser, though having no connection therewith as a fiduciary, is charged with the performance of a duty with reference thereto which is inconsistent with the character of purchaser.
4. **Executors and Administrators—Purchase of Property at Own Sale.**—A purchaser of property of his decedent's estate by an executor or administrator, at his own sale thereof, unless tainted with actual fraud, will not be declared void, but merely voidable at the option of those interested in the estate, upon whose application, if seasonably made, a court of equity will either set aside the sale or declare the purchase a trust for the benefit of all to whom the estate should go.
5. **Executors and Administrators—Purchase of Property at Own Sale.**—As in this case the purchase of a farm by the executor at a decretal sale made by him of his testator's real estate, though reported to the court as having been made as agent for his (the executor's) wife, came within the inhibition of the rule, *supra*, the action of the chancellor in sustaining the exceptions filed by certain of the parties in interest to the report of sale and setting the sale aside, was not error.

HERCHEL T. SMITH for appellant.

BEN T. DAVIS for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

Joshua Naylor, a resident of Fulton county, died in the year 1912, testate, survived by five children and leaving, besides some personal property, certain real estate consisting of two lots in the city of Hickman and a farm of 205 acres in Fulton county. His will was admitted to probate by the Fulton county court and his sons, J. W. Naylor and Lon Naylor, therein appointed executors without security, duly qualified in that court as such. The will devised the testator's real and personal estate, after the payment of his debts, equally to his children and the children of such of them as might not be living at the time of his (the testator's) death, but provided that the executors should within five years after the testator's death sell all the real estate and divide the proceeds equally among his children, charging each with such advancements as may have been received from him; and that until sold by the executors, the whole of the real estate should be rented out by them.

Lon Naylor died intestate after qualifying as an executor of his father's will, survived by his wife, Clara Naylor, and two infant children, Dorothy Naylor and Lon LaRue Naylor, of each of whom the mother became and is the duly appointed, qualified and acting statutory guardian. Since the death of Lon Naylor, J. W. Naylor as surviving executor of Joshua Naylor's will has had sole charge of the latter's estate, and this action was brought by him as such executor against the devisees under the will and certain creditors of the testator to obtain a sale of the lands, distribution of the proceeds and settlement of the estate.

As the will of the testator empowered the executor to privately sell the real estate, in the absence from the record of the pleadings in the case, which seem to have been omitted by agreement of the parties, we are unadvised of his reason for applying to a court of equity for authority to do so, but will assume that it was because he desired the additional authority from the court, or that it was demanded by the devisees or some of them. At any rate such authority was given by the judgment rendered by the circuit court, which prescribed the terms of the sale and directed the surviving executor to make it for the purpose of distributing the proceeds among the devisees as contemplated by the will, but to do so at public auction and after due advertisement. Manifestly, the fact that the sale was authorized by the judgment of the court as well as by the will, can not affect its validity, in the absence of a complaint and showing that the property would have brought a greater amount of money had it privately been sold by the executor in literal compliance with the direction of the will. Not only is there no such complaint in the case, but on the contrary the record shows that the parties were in full accord as to the purposes of the action and all proceedings had and taken therein prior to the entering of the judgment, and that the judgment itself was an agreed one. As will presently be seen the controversy between the parties now contending arose at and following the sale of the devised real estate, all of which was sold by the executor as directed by the judgment of the circuit court, his report thereof, later filed in that court, reciting that the two city lots were purchased by Clara Naylor, widow of Lon Naylor, at the price of \$1,200.00, and the

farm of 205 acres by Nora V. Naylor, wife of the executor, J. W. Naylor, at the price of \$10,000.00. As no exceptions were filed to the report respecting the sale of the city lots, the sale thereof was duly confirmed by an order of the court. But the infants, Dorothy and Lon L. Naylor, in their own right and by their statutory guardian, Clara Naylor, and the latter as such guardian and in her own behalf as widow of Lon Naylor, filed exceptions to so much of the report of sale as set forth the purchase of the farm of 205 acres by the executor's wife, Nora V. Naylor, which attacked the validity of its sale to her, objected to its confirmation by the court and asked that it be set aside and the farm again sold.

The circuit court after hearing evidence on the issues of fact made by the exceptions respecting the sale of the farm, sustained the exceptions thereto, set aside the sale and ordered a resale thereof by the executor. From the judgment evidencing these rulings both the executor, J. W. Naylor, and Nora V. Naylor have appealed.

The objections raised by the appellee's exceptions to the sale of the farm are: (1) That the executor's purchase of it from himself, whether made for himself or as agent for his wife, was contrary to law, because violative of the trust arising out of the relation sustained by him as a fiduciary to the property sold and the persons among whom its proceeds are to be distributed. (2) That the land was sold at a grossly inadequate price. It is not perceived that an executor can exercise any right or power, not conferred upon him as a fiduciary by the will, that is not permitted by law of any other trustee of an express trust; and of such trusts it is said:

"One of the most familiar doctrines of the law of trusts is that a trustee can not purchase from himself or at his own sale. The law does not stop to inquire into the fairness of the sale or the adequacy of the price, but stamps its disapproval upon a transaction which creates a conflict between the self interest and integrity of the trustee. The rule embraces not only direct purchases but also indirect purchases through third persons, and applies regardless of whether the sale is private or under decree, or whether the *cestui que trust* is an infant or adult, and even though the purchaser is only one of several co-trustees, or is acting as agent for a third person.
... " 39 Cyc. 366-367.

The applicability of the above doctrine to executors and administrators is thus stated in 18 Cyc. 326-7:

"It is well established as a general rule that an executor or administrator can not become the purchaser at his own sale of the property of his decedent. Neither can one executor or administrator lawfully become the purchaser at a sale made by his co-executors or co-administrators. The rule precludes the representative not only from purchasing outright but also from being interested in any purchase at a sale by him, neither is it confined in its application to a direct purchase, but an indirect purchase by means of an agent or a third person who is the ostensible purchaser, but who really acts for the representative in order to enable him to acquire title, may also be avoided."

This rule has uniformly, and even strictly, been applied by this court, not only as to sales at which the executor or administrator became the purchaser for himself of his decedent's property, but likewise to all sales of such property where the purchaser, though having no connection therewith as a fiduciary, is charged with the performance of a duty with reference thereto which is inconsistent with the character of purchaser. And this is true whether the sale be by judicial decree or made under a power of sale. *Darcus v. Crump*, 6 B. Mon. 363; *Faucett v. Faucett*, 1 Bush 511; *Price's Adm'r v. Thompson*, 84 Ky. 219; *Conrad v. Conrad*, 152 Ky. 422; *Spurlock v. Spurlock*, 161 Ky. 248; *Penn v. Rhoades*, 124 Ky. 798; *Bagby v. Eversole*, 6 R. 365; *Sears v. Collie*, 148 Ky. 444; *Baker v. Weeks*, 178 Ky. 520; *Jones v. Deposit and Peoples Bank*, 180 Ky. 395.

The reasons supporting the rule, *supra*, had they not already been stated, are self evident. Concretely set forth they are: That to permit an executor, trustee or other fiduciary having in charge trust property, to purchase it from himself, would allow him to create in himself an interest opposite to that of the party or parties for whom he acts, and at the same time a conflict between the self interest and integrity of the fiduciary, thereby furnishing both motive and opportunity for his profiting from his relations to the property as a trustee, at the expense of those it is his duty to protect.

In some jurisdictions certain limitations of the rule, *supra*, have been recognized, as where the executor or

administrator making the purchase at his own sale has a personal interest in the property sold. *Julian v. Reynolds*, 8 Ala. 680; *McLane v. Spence*, 6 Ala. 894; *Michord v. Girad*, 4 Howard (265) 503; or where the sale was a fair one and a fair price was given for the property. *Brannon v. Oliver*, 2 Stew (Ala.) 47; *McKey v. Young*, 4 Hen and M. (Va.) 430; *Toler v. Toler*, 2 Patt & H. (Va.) 71. But according to the weight of authority courts generally give little recognition to such limitations, and we have been referred to no case in this jurisdiction upholding such a limitation of the rule as either of those mentioned. Certainly the first should not prevail if, notwithstanding the fiduciary's interest in the property, his purchase thereof would result to the disadvantage and injury of others having an interest in the property; and whether this court would or not consider the applicability of either of such limitations could only arise in a case in which there was a conclusive showing by proof, not only of the utmost good faith on the part of the fiduciary making the purchase and an entire absence of fraud in the sale, but also that the price or amount paid by the latter for the property equaled its highest market value and that to set aside the sale would necessarily cause serious and irreparable loss to the devisees or heirs, or some of them, entitled to share in the proceeds of sale.

Cases decided by this court may be found, however, which hold that acquiescence in the sale by the devisees or heirs for a long time will create a presumption of ratification or be held to constitute such laches as would estop a belated attack upon it. *Johnson v. Poff*, 109 Ky. 396; *Spurlock v. Spurlock*, 161 Ky. 248. This is so because a purchase by an executor or administrator at his own sale is usually held to be not void, as would be the case if the transaction were tainted with actual fraud, but merely voidable at the option of those interested, therefore the right to attack the sale must be exercised within a reasonable time. In *Johnson v. Poff*, *supra*, the attack upon the sale complained of was made thirty years after the sale occurred, and in *Spurlock v. Spurlock*, *supra*, fifteen years after the sale and more than five years after the youngest of the litigants, who were infants at the time of the sale, became twenty-one years of age; hence, in each of those cases it was held that the attack upon the sale came too late. In the instant case, however, the sale complained of was attacked by appellees with the greatest

speed practicable by the proper filing of exceptions to the report thereof as made by the executor, which present fully all questions of law and fact by which the validity or invalidity of the sale must be determined.

It appears from the evidence heard on the exceptions that the appellant, J. W. Naylor, although appointed by the judgment of the circuit court to do so in his executorial capacity, did not himself make the sale of all the real estate it directed to be sold, but only cried the sale of the two city lots, after which he suggested to appellees that they agree upon another person present to act as auctioneer in selling the farm, to which they assented, and the sale thereof was made by the person so agreed upon, at which the appellant, J. W. Naylor, was a bidder. Two bids were made on the farm by others followed by his bid, which was the third and last bid and the only one made by him; thereupon the farm was knocked down to him at \$10,000.00, the amount of his bid. Whether the fact that he was a known devisee of his father's will and by reason thereof a part owner of the land and entitled to share in the proceeds thereof, caused the two previous bidders and other persons present to favor him by refraining from bidding against him after his bid was made, does not appear from the evidence, but all the circumstances attending his purchase of the land should be considered in passing on the validity of the sale.

Certain facts of greater import than the circumstance just mentioned, are also to be considered. One of these facts appearing from the evidence is, that neither at the time of making his bid nor when the farm was knocked down to him, did the appellant, J. W. Naylor, announce that he was not bidding for himself or that he was bidding for his wife; nor was there any announcement from the acting auctioneer when, before or after he accepted the bid of J. W. Naylor and declared him the purchaser of the farm, that the purchase was made by the latter for his wife. Another significant fact tending to discredit the claim of J. W. Naylor that his purchase of the farm was made for his wife, is furnished by the sale bond filed with his report of the sale, which was taken by him for the purchase price of the farm as fixed by his bid, and in and to which, notwithstanding the statement of the report of sale that he caused it to be executed by the wife, her name does not appear. On the contrary, the bond was signed by him, not as an agent for his wife, but as the principal

obligor, and below it is the name of his surety. The bond, therefore, is one executed by himself and surety and made payable to himself as executor. That it was so executed and yet so appears, gives strong support to the contention of appellees that the farm in question was purchased by Naylor for himself and the sale bond for that reason executed in the manner stated, but that upon his later discovering or being advised of the probability of objection to the sale and of its being set aside because of the purchase of the land by him, he concluded, as a possible means of avoiding such a result, to report the sale to the court as having been made to his wife.

Laying aside consideration of the question whether an obligation expressed in such terms and executed as was the sale bond referred to, is enforceable against the obligors, we are constrained to hold, as did the circuit court, that the sale of the farm in question was and is voidable, whether its purchase by the appellant, J. W. Naylor, was made for his wife or himself, as the facts and circumstances attending the sale are of such character as to cause grave doubt of the good faith of the executor and lead to strong suspicion that his executorial relation to the property sold and parties affected by the sale, was improperly used to his advantage and the latter's disadvantage.

If the appellant's purchase of the land for himself was forbidden by law because of his fiducial relations with the property and parties, he was equally without right to purchase it as the agent of another; and especially does the law declare this to be so where the person for whom he acts as agent in making the purchase is a near relative and by reason thereof in a position to be unduly favored by him. 18 Cyc. 330; *Scott v. Gamble*, 9 N. J. Eq. 218; *Schaefer's Estate*, 10 Pa. Co. Ct. 100. Manifestly a wife is not only to be classed as a near relative of and likely to be unduly favored by the husband, but naturally the person whom he would select above all others to hold for his benefit the title to property which the law would not permit him to hold in his own name.

The evidence regarding the market value of the farm introduced on the trial of the issues made by the exceptions to the report of sale, is unusually conflicting, that of the eight or more witnesses for the appellees conducing to show that the farm is worth from \$2,000.00 to \$3,000.00 more than the accepted bid of the executor, and

that of an equal number of witnesses for appellants being to the effect that it brought at the sale its full market value. It will at once be seen that the market value of the land is left in doubt by the proof, which fortifies our conclusion that the sale should be set aside on the ground that its purchase by the executor was forbidden by law. For as equity does not look with favor upon the purchase by an executor or administrator, whether for himself or another, of the property of his decedent, it, upon seasonable application, will either set aside such sale or declare the purchase a trust for the benefit of those interested in the estate; and as such application was seasonably made by appellees in this case and they elected to move to set aside the sale, the relief sought was properly granted by the chancellor.

Wherefore the judgment is affirmed.

Kies, et al. v. Williams, et al.

(Decided February 22, 1921).

Appeal from Allen Circuit Court.

1. Minerals—Completion of Wells—Manner of.—An oil lease which requires the lessee to complete a well or wells on the property within a given time or forfeit the lease is satisfied by the drilling of a hole in proper manner to the depth of the sand or formation in that district from which oil or gas is usually produced.
2. Minerals—Completion of Wells.—A completed well does not necessarily mean a producing well unless this intention is manifest from the lease contract.
3. Mines and Minerals—Contract for Oil or Gas Well—Construction.—Where an oil lease is in undeveloped territory and it is apparent from the lease contract that the parties to it contemplated the prospecting of the land to discover whether it contained oil or gas, any expression requiring the drilling of a well or wells in order to avoid a forfeiture of the lease will be satisfied by the drilling of a hole or holes of oil well size to the depth of the sand from which oil is usually taken in that general district.

BRADBURN & HARLIN, SIMS, RODES & SIMS and OLIVER & DIXON for appellants.

GILLIAM & GILLIAM for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

This suit was commenced by appellees, Williams, et al., April 2, 1919, to obtain a cancellation of an oil and gas lease of date March 15, 1918, on a tract of 365 acres of land located in Allen county, on the ground that the lessees, Kies and Clinger, had failed to complete two oil wells on the premises within one year from the date of the lease in accordance with a clause thereof, forfeiting the lease unless "two wells shall be completed on the premises within one year from the date hereof." From the evidence it appears that the lessees began the drilling of the first well on the lease shortly after the lease contract was entered into, and completed this hole by drilling into the oil sand of that district Nov. 1, 1918. This was a dry hole. The second well was soon located and work begun on it and it was drilled into the oil sand on March 15, 1919, the day the one year period expired, and this is an oil producing well, though small. Since that time several other wells have been drilled on the lease, most of them producing oil in paying quantities, and there are now a number of pumping outfits, tanks, rigs and appliances on the premises, and the lease is regarded as a valuable one.

The case was prepared by the taking of a large volume of evidence, mostly on the questions as to whether the second well was completed within one year from the date of the lease, and whether it was an oil producer. The first one is admitted to be dry. The learned trial judge delivered a written opinion in which, after copying the forfeiture and rental clauses of the lease, he construed them to mean:

"That the lease was to terminate at the end of one year, unless two wells should be completed. If, however, no well should be completed before the expiration of the year, the lessees might still avoid the cancellation of the lease by paying in advance a certain rental, which would further extend the right to explore for oil. No rent would be due under the contract, in the event two wells should be completed. Merely drilling a well is not completing a well, and a well which has only a showing of oil, is not a completed well, no matter what might have been the expense, nor what may be its depth. There must be a discovery of oil in sufficient quantity to produce revenue, or be capable after the application of proper equipment, to produce revenue, from which the lessor, the owner of the royalty, would derive a financial benefit."

A judgment was entered cancelling the lease in part, largely if not entirely upon the supposed default in payment of the rentals, and Kies, etc., appeal. It therefore follows that a proper and just decision of this case involves a correct construction of the oil lease.

The oil lease in question contains the following clause: "Provided, however, that this lease shall become null and void and all rights of either party hereunder shall cease and determine unless two wells shall be completed on the premises within one year from the date hereof and a third well completed within two years from the date hereof." Appellees, Williams, et al., rely upon the foregoing forfeiture clause and the following rental clause for a cancellation of the lease. The rental clause reads: "The party of the second part shall after one year from date hereof, pay at the rate of three hundred and sixty-five dollars (\$365.00) for each year, quarterly in advance, thereafter until oil is produced from the land hereof."

The rental clause is the next sentence in the lease following the forfeiture clause, but they relate to entirely different subjects and were intended for different purposes.

By the forfeiture clause the lease was to become void and all rights of either party thereunder cease and determine unless two wells were completed upon the premises within one year from March 15th, 1918, the date of the lease, and in case these two wells were completed within one year from such time, the lease should become and be null and void at the end of two years if the third well was not completed within that time from the date of the lease.

These were positive, effectual and unequivocal forfeiture clauses which gave to the grantee, Harris, and his successors in title the right to terminate the lease entirely, if these conditions were not kept and performed.

But the rental clause copied above neither adds to nor detracts from the forfeiture clause but relates entirely to another subject.

If two wells were completed on the premises within one year from March 15th, 1918, the date of the lease, appellees were not entitled to a forfeiture of the lease at the time of the commencement of this action, April 2, 1919, irrespective of the payment of rentals provided for in the rental clause quoted above.

The completion of the third well was not required under the lease until about a year after this action was begun, and no forfeiture was or could have been claimed on account of the failure to complete it at the time of the institution of this suit.

From the evidence we learn that the first well was drilled into the sand from which oil is produced in that district several months before the time limited in the lease, but it was non-productive of oil—a dry hole. The second well was drilled into the oil sand on the last day of the year in which appellants were to complete the two wells, and it was and is a producer of oil in quantities sufficient to be profitable to both lessors and lessees.

The trial court held the words “completed well” to mean a producing well, and not merely a well drilled to the depth required to reach and produce oil in that field, and further that hole No. 1 on the lease did not amount to a well within the meaning of the terms of the lease, and that hole No. 2, being a small producer, did not fulfill the requirements.

To this we can not consent. The first hole, though a non-producer, if drilled, as it is conceded it was, to the depth of the oil producing sand in that oil field, was a well within the plain intent and meaning of the forfeiture clause of the lease. To complete means to finish, accomplish that which one starts out to do. A completed oil well is one drilled to the formation or sand in which oil in that district is usually and commonly found, whether oil be found in the hole or not, unless a different meaning is expressed in the contract. Here no different meaning was expressed. Completed wells do not necessarily mean oil producing wells, for a well might be drilled to an unmeasurable depth and yet not produce oil. The parties to this lease contemplated only the development of the lease by the drilling of at least two wells in the first year so as to determine if the lands contained oil in paying quantities, and it was such prospect or test holes which grantees were required to drill in order to save a forfeiture. *Hunt v. Garvin*, 190 Ky. 472.

The purpose of the forfeiture clause was to force the lessees to immediately develop the property for oil by drilling to the oil sand in order that the lease might be tested and explored for oil and gas and if found the lessor might receive royalties, and also to protect the property from drainage by other oil wells drilled near its mar-

gin. Such precautions are safeguards against unnecessary and destructive delays in oil well drilling and are oftentimes the cause of prompt action on the part of the drillers. While forfeitures are not favored in law, oil and gas leases will be cancelled on proper application by the lessor when the lease contains a forfeiture clause similar to the one here involved, if its conditions have been violated. The parties so contracted, and being *sui juris* are bound thereby. Oil lease contracts are an exception to the general rule that deeds and other grants of land or an interest therein are to be construed in favor of the grantee and strongest against the grantor, for in these kinds of grants the rule is reversed and the entire lease and all its terms and especially forfeiture clauses are construed strongest against the grantee. Thornton on Oil and Gas 223; Monarch Oil & Gas Co. v. Richardson, 124 Ky. 607.

Notwithstanding this rule a forfeiture of a lease will not be adjudged if the terms of the lease have been kept, and as the two wells were completed within the one year period fixed by the lease there was no ground whatever for a forfeiture. Moreover, courts are very remiss to grant a forfeiture in a case like this where great hardship will necessarily result to the grantee who in apparent good faith has made large investments in improvements and thus made the property valuable by his efforts and expenditure of money. In purchasing the lease the grantees were out a large sum of money, to which must be added the cost of some ten wells drilled on the property, and a large amount of oil well machinery and supplies located on the premises.

The failure of the grantees to pay the rentals in advance did not, nor was intended, to work a forfeiture of the lease. The lease contract does not so provide; nevertheless it was the duty of the grantees to make such payment in advance, but their failure to do so did not operate to annul the lease. If the contract had contained a clause saying in effect that a failure to pay said rentals in advance would work a forfeiture of the lease, it would have been enforceable, but in the absence of such a clause the failure to pay the rentals when due did not have such effect. If the grantees should fail to pay the rentals in advance under the lease, the owner of the surface could maintain an action against them.

It does not therefore matter in this litigation that the rentals were paid in whole to Harris and by him tendered

after the due date to each of the actual joint owners of the surface. It would be otherwise if the lease contract had provided for a forfeiture of the lease for the non-payment in advance of the rentals provided therein. These rentals were also intended to hasten development, and to cause the lessees to surrender the lease in case no development was in good faith contemplated, in order to avoid the payment of rentals. No rentals would, however, become due under this lease if a producing well had been brought in on the lease before the expiration of the year, and when the lease began to produce oil in paying quantities the stipulated rentals ceased. A producing well, as here used, is one the product of which yields a royalty to the landowner, and not one in which oil is allowed to stand without being taken and prepared for market.

Wherefore the judgment is reversed with directions to set aside the order annulling and cancelling the oil and gas lease of date March 15, 1918, and to dismiss the petition.

Giltner v. McCombs Producing and Refining Company.

(Decided February 22, 1921).

Appeal from Jefferson Circuit Court (Common Pleas, Third Division).

1. **Principal and Agent—Commissions.**—One who enters into a contract for the sale of property, either real or personal, for another for compensation, and in pursuance to the contract finds a purchaser who is able, willing and ready to buy the property at the price and on the terms fixed by the principal, but the sale is not consummated because the principal refuses to carry out the contract, is entitled to his commission in the same way as if the sale had been completed.
2. **Pleading—Conclusion of Pleader.**—The averment of mere conclusions of law without the facts from which they are deduced in a pleading is bad.
3. **Pleading—Action for Value of Services—Sufficiency.**—A petition which states with reasonable certainty the time of the making of the contract, the promise to pay a definite amount for services, the performance of the services in accordance with the agreement, the finding of a purchaser as required by the agreement and the purchaser's ability and willingness to buy and pay for the property at

the price and on the terms fixed by the principal, the refusal of the principal to carry out the contract, although the purchaser is ready to take the property and pay for same, and demand of the agent for his commission and refusal of the principal to pay, states a cause of action.

BROWN, LOGAN & MYATT, J. BLAKEY HELM and CLAYTON
B. BLAKEY for appellant.

GRUBBS & GRUBBS and STITES & STITES for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

Appellant, Giltner, claiming to be the broker or agent of the McCombs Producing and Refining Co. for the sale of a certain number of shares of its capital stock, and having found a purchaser at the price and on the terms proposed by the company, brings this action to recover of said company his commissions or compensation for the services rendered, although the company, he charges, violated its agreement and failed and refused to issue the stock to the purchaser who was ready, able and willing to buy and pay for the same.

After showing the corporate capacity of the company to sue and be sued, and the changing of its name, the petition avers in substance that the defendant company, in the fall of 1918, promised and agreed to pay plaintiff 8900 shares of its capital stock for his services in selling J. W. McCulloch 44,500 shares of its capital stock; that he sold to McCulloch said number of shares of stock and McCulloch was ready, able and willing to take and pay for same in accordance with the terms and conditions agreed upon between Giltner and the company, but said company refused to issue said stock to McCulloch although it had agreed to do so; that McCulloch offered to pay to the company the full price which the company asked and proposed to take, according to the company's terms, but the company refused to accept payment or issue the stock to McCulloch; that having fully performed his part of the contract he demanded of the company 8900 shares of its capital stock in payment for his services according to the agreement between them, but the company failed and refused to issue or deliver to him said stock or any part thereof or to pay him for his services. It is further alleged that the stock of the company, which was of the par value of \$1.00 per share, was at the time of the sale worth \$2.50 per share in the market or a

total of \$22,250 for the 8900 shares which was due him for his services.

To this petition a general demurrer was sustained by the trial court, and the plaintiffs declining to further plead, the action was dismissed and Giltner appeals to this court.

In sustaining the demurrer to the petition the trial court said:

"The rules of pleading require that the contract sued on shall be substantially set out and the breach thereof assigned in the words of the contract or in words which are co-extensive with the import and effect of it.

"See *Moxley v. Moxley*, 2 Met. 309; *Averback v. Hall*, 14 Bush 505; *Miles v. Miller*, 12 Bush 134.

"The petition not conforming to these requirements the demurrer thereto is sustained."

It must be conceded that the rule stated by the court in sustaining the demurrer is fundamental and absolutely sound, but has it application to the pleading in this case?

One who enters into a contract with another for the sale of property, either real or personal, for compensation, and performs his part of the agreement by finding and producing a purchaser who is willing, able and ready to buy the property offered for sale at the price and on the terms which the principal has fixed and agreed upon with the agent or broker, and the principal refuses to deliver or convey the property and no sale for that reason is consummated, the agent or broker is entitled to his pay or commission and may recover same of the principal. *Coleman's Ex'r v. Meade*, 13 Bush 358; *Futrell v. Reeves*, 165 Ky. 282; *Curry v. Fetter*, 15 K. L. R. 494; *Pope v. Caddell*, 125 Ky. 837; *Womack v. Douglas*, 157 Ky. 716; *Mueller v. Nugent*, 187 Ky. 61.

There is no dispute that the Code forbids the allegation of a mere conclusion of law deduced from facts not stated but requires that the facts constituting the cause of action or defense shall be set out in the pleading. *Newman's Pleading and Practice*, Vol. I, page 270. When the pleading avers in plain and concise language that the defendant agreed and promised to do a certain named thing or pay a certain designated debt it is a statement of fact and not a conclusion of law. Nor is the averment that defendant promised and agreed to pay or give a definite number of shares of stock for the performance of a certain named sale a conclusion of law. Facts may under our

Code be pleaded according to their legal effect, and when the basic facts are alleged showing the right of plaintiff to recover, a demurrer will not lie even though the pleading be indefinite or lacking in formality.

The petition states with reasonable certainty the time of making the contract, the promise to pay an agreed amount for the services of plaintiff; the performance of services in accordance with the agreement; the finding of purchaser for the stock who was able, ready and willing to buy and pay for same at the price and on the terms which the defendant company fixed; that the defendant company failed and refused to issue or sell the stock to the buyer which plaintiff produced although it had agreed to do so; thereafter plaintiff demanded of the company the issual to him of the 8900 shares of the stock in payment for his services, which was refused by the company. We think this was a reasonable compliance with the rule requiring a pleading to substantially set out the contract and the breach thereof. While the petition is a very feeble and inapt attempt to state a cause of action we are constrained to the view, after much consideration of the matter, that it was sufficient on general demurrer and the demurrer should have been overruled. In a case like this where the pleading is not up to the standard of good pleading, counsel should unhesitatingly amend it so as to bring it clearly within the Code requirements, when this can be done, as appears would have been quite easy in this case.

Judgment reversed.

Young, et al. v. Fiscal Court Trimble County, et al.

(Decided February 25, 1921).

Appeal from Trimble Circuit Court.

1. Counties—Fiscal Management, Debt and Taxation—Power to Issue Bonds.—The limit of a bond issue under Ky. Const., sec. 157a, is determinable by the amount that can be raised by a levy of 20 cents on each \$100.00 of the assessed property valuation at the time of the issuance and sale of the bonds and not at the time a vote authorizing said issue is taken.
2. Counties—Fiscal Management, Debt and Taxation—Power to Issue Bonds.—A vote in favor of a bond issue under Ky. Const., sec. 157a, does not of itself create an indebtedness as the debt is not incur-

red until the bonds are issued and sold, hence an election as to incurring indebtedness by the issue of bonds is not invalid merely because at the time of the election the debt limit has been exceeded where same is not exceeded at the time the bonds are actually issued and sold.

- 3 Counties—Issue of Bonds for Road Purposes—Deferring Issuance.—In an election held in May, 1916, the county was authorized to issue bonds to the amount of \$90,000.00 for road purposes under Ky. Const., sec. 157a, but it was deemed expedient and advisable by the county officials at the time to issue only one-half of the amount authorized. More than four years after the vote was taken the county decided to issue additional bonds for road and bridge purposes under the previous election: Held, that the circumstances presented by the record were such that the county officers were justified in deferring the issuance of the additional bonds for period stated.

CLAUDE B. TERRELL for appellants.

EUGENE MOSLEY and CHAS. CARROLL for appellees.

WINSLOW & HOWE, *Amici Curiae*.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The parties to this appeal filed an agreed statement of facts in the court below in which it is stipulated that appellants are property owners in Trimble county; that appellees were fiscal officers of the county; that an election was properly ordered to be held in Trimble county on May 27, 1916, for the purpose of submitting to the voters in the county this question:

“Are you in favor of authorizing the fiscal court of Trimble county, Kentucky, to issue and sell \$90,000 in bonds for the purpose of constructing and reconstructing the roads and bridges in said county?” that more than two-thirds of the voters at said election voted in favor of the authorization of said bond issue.

On September 2, 1916, according to an order of the fiscal court it was deemed advisable to issue only \$45,000, or one-half of the authorized amount, and this was done and the denomination and maturity of the bonds fixed in said order; the bonds to bear interest at the rate of 5 per cent. per annum, all payable within thirty years from date.

A levy of 20 cents on each \$100 of taxable property in the county was made in 1916, and in each subsequent year, for the purpose of paying the interest on said bonds so issued and sold, and to create a sinking fund for re-

deeming said bonds at maturity. It is further stated that the fiscal court can and, if necessary to pay the interest and create a sinking fund to redeem said bonds, will appropriate out of the tax levy for general purposes the sum of 14 cents on each \$100 of the assessed value of property in the county. Other than the \$45,000 there are no bonds outstanding against the county, and there is now in the sinking fund for the redemption of said first bond issue the sum of \$15,000.

The assessed value of the property in the county from 1916 to 1921 inclusive is given in the agreed case.

It is further stated that the fiscal court is about to and will, unless prevented from so doing, issue and sell additional bonds to the amount of \$23,000 to be used for the purpose of constructing and reconstructing bridges and roads in the county, the same being a part of the bond issue authorized by the election held May 27, 1916. All of said bonds, if issued, will mature and become due and payable within thirty years from date of same.

The legal point to be determined according to the stipulation involves the authority of the fiscal court to sell or issue the \$23,000 of bonds.

Only two questions need to be considered: First, is the limit of the bond issue to be determined by the amount that can be raised at the time the vote is taken by a 20 cent levy, or is it to be determined by the amount that can be raised by such levy at the time of the issuance and sale of the bonds? Second, has the fiscal court, through its failure to issue the entire authorized amount, lost the right to issue bonds now that more than four years have elapsed since the vote was taken?

Upon submission to the lower court judgment was entered authorizing the issue of the additional bonds under the authority of the election held May 27, 1916, same to be issued and to mature at such time in legal limits as the fiscal court might determine, and to bear interest at the rate of 5 per cent per annum, payable semi-annually, the proceeds of said bonds to be used for the purpose of constructing and reconstructing the roads and bridges in Trimble county.

Authority for this bond issue is found in sec. 157a of the Constitution, which provides:

“The credit of the Commonwealth may be given, pledged or loaned to any county of the Commonwealth for public road purposes, and any county may be permit-

ted to incur an indebtedness in any amount fixed by the county, not in excess of five per centum of the value of the taxable property therein, for public road purposes in said county, provided said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law and when any such indebtedness is incurred by any county said county may levy, in addition to the tax rate allowed under sec. 157 of the Constitution of Kentucky, an amount not exceeding twenty cents on the one hundred dollars of the assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness."

From 1916 to 1921 there has been a decided increase in the assessed value of property in Trimble county. The authorized limit of 20 cents on each \$100 on the 1916 valuation would not have netted an amount sufficient to pay the interest on the entire issue, but if the indebtedness is not created until the bonds are actually issued the amount derived from levies, based upon assessments subsequent to 1916, would seem ample to take care of the additional sum now sought to be issued, as well as the first issue.

It seems to be well settled that a vote in favor of a bond issue does not of itself create an indebtedness as the debt is not incurred until the bonds are issued and sold, therefore, an election as to incurring indebtedness by the issuance of bonds is not invalid merely because at the time of the election the debt limit has been exceeded, where the debt limit is not exceeded at the time of the issuance and sale of the bonds. *McQuillen on Municipal Corporations*, sec. 2232.

This is the view taken by this court. For instance, in *Frost, etc. v. Central City, etc.*, 134 Ky. 433, 120 S. W. 367, a question was submitted to the voters of the city at an election held in November, 1908, as to whether the city should be empowered to issue \$24,000 in bonds for the erection of two school buildings. The proposition carried. One of the objections urged in a suit filed by a citizen to enjoin the bond issue was that at the time of the election the city already had a bonded debt so great that under sec. 158 of the Constitution no additional indebtedness could be created. It appears that at the time of the election there was outstanding against the city \$30,000 in water company bonds, but before the institution of the

action these had been paid off and cancelled, so that the city had no bonded indebtedness at the time suit was filed. With the water bonds paid off and discharged, the city had the authority to incur an indebtedness of \$24,000. On the question of whether the indebtedness was created at the time of the election or at the time of the issuance of the bonds the court said:

“Clearly the election is only one of the steps necessary to be taken in order to legally create the indebtedness, and the indebtedness itself is not created until the bonds are sold. No good would result in holding that the election is void because at the time it was held the city could not under the Constitution have issued the bonds which the voters authorized. Every substantial good intended to be effectuated by the Constitution will be subserved by holding that the right to issue bonds is to be determined by the condition of the indebtedness of the municipality at the time the bonds are sold. The intention of the Constitution was to limit the aggregate amount of the bonded indebtedness of municipalities; and, when this is effectuated and the indebtedness kept within the prescribed limits, the whole intent of the framers of that instrument is subserved.”

To same effect see *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498. This case involved the liability of the city for expenses of an engineer employed to report upon the condition of the water company. The authorization for his employment was based upon a joint resolution by the general council, approved August, 1907, which directed that these expenses be paid out of the general purpose fund of the next ensuing fiscal year, beginning September 1, 1907. Had the city by the adoption of the resolution incurred the indebtedness therein contemplated the court held it would have been an attempt on the part of the council to create an indebtedness exceeding the income and revenue for the year in which the resolution was adopted, but that the adoption of the resolution did not create an indebtedness; this was not done until the employment provided for in the resolution was made and the employment was not made until after the beginning of the next fiscal year. The mere adoption of the resolution did not violate the constitutional provision.

In *Bosworth v. City of Middlesboro*, 190 Ky. 246, 227 S. W. 170, a like question was involved and in that case it is said that if the bonds were never sold or delivered no

indebtedness could or would be incurred on their account; that no contract of any kind would have been entered into sufficient to create an indebtedness until the sale and delivery of the bonds. See also *Redding v. Espleson Borough*, 207 Pa. St. 248; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723; 28 Cyc. 1584.

Many conditions might arise to cause a postponement of the issuance and sale of an authorized issue of bonds. Later developments might prove it unwise, inexpedient or even unnecessary to float the full sum authorized. It may be the balance of the bonds would never be issued. Had the amount not exceeded the constitutional limit it is possible the county authorities could not have expended so large a sum of money at one time, and it would be folly to allow the proceeds of the entire issue to remain idle in the hands of the county treasurer or even on deposit in a bank at nominal interest. This would be poor business management, and a needless burden on the taxpayers.

We think the rule established by this and other courts a sound one, namely, that the vote of the electors does not create an existing indebtedness.

No debt is created until the bonds are issued and sold. The time of the actual issue of the bonds is the time for determining whether the debt limit is exceeded.

Our conclusion on the first of the two propositions raised by the appeal in reality disposes of the second, because if the fiscal court is not compelled to issue at one time the full amount of bonds authorized it necessarily follows that a reasonable time will be allowed within which to dispose of the remaining portion of the authorized issue.

The apparent inability of the county to immediately expend the proceeds of the entire issue; the fact that this country shortly after the vote was taken entered into the World War and that it became well nigh impossible to dispose of municipal bonds on a 5 per cent. basis, doubtless convinced the fiscal officers either that the exercise of a wise discretion rendered it advisable or the situation confronting them made it necessary that they defer any further attempt to issue or sell bonds until such time as conditions might change or present a more favorable market in which to dispose of the additional issue.

In *Moller v. City of Galveston*, 23 Tex. Civ. Ap. 695, 57 S. W. 1116, it was held that a delay of two years did

not invalidate an issue of sewer bonds. The circumstances considered we are not prepared to say such an unreasonable length of time has elapsed since the vote was taken as would invalidate the contemplated issue and sale of the \$23,000 of bonds.

Mention is made in the briefs that it is the intention of the county authorities to use the proceeds of the bond issue to supplement an amount raised by private subscriptions from the citizens of Trimble county as the latter county's proportion in the construction of a federal-state aid road from Milton to Paducah. But this question is not here. It is not included in the stipulated facts, and, as stated by counsel for appellant, the only two questions involved on this appeal are those above given.

Satisfied as we are that the judgment of the lower court is correct the same will be and is accordingly affirmed.

Miracle v. Stone.

(Decided February 25, 1921).

Appeal from Bell Circuit Court.

1. **Sales—Conditional Sales.**—Whether a transaction giving one, whose property is sold either by the execution of a deed himself or at public sale, the right to repurchase the property within a stipulated time upon stipulated conditions, is to be construed as a mortgage or a conditional sale is one primarily to be governed by the intention of the parties as gathered from all the admissible evidence in the case, and the fact that the conveyance to the vendee, who agreed to the reconveyance which creates the defeasance, is absolute in terms will not affect the nature of the transaction, provided it be, as measured by the legal rules for interpreting such transactions, a security for the payment of money.
2. **Sales—Conditional Sales.**—If the vendee in such a transaction is not a creditor of the vendor nor becomes such at the time, nor agrees to become one in the future, so that the relation of debtor and creditor does not exist between the parties, the transaction will be deemed a conditional sale and not a mortgage, and the same will be true notwithstanding the vendee holds a debt against the vendor if the transaction itself extinguishes that debt; neither will a mortgage be created unless the rights of the parties, as well as their remedies, be mutual, i. e., if the vendor may treat the transaction as a mortgage and not as a conditional sale, likewise the vendee should have the same rights and the same remedies, for

unless he may sue and recover of the vendor the amount agreed to be paid for the reconveyance and enforce his lien therefor, there are no reciprocal rights, in which case the transaction will be deemed a conditional sale and not a mortgage.

3. Sales—Conditional Sales.—Under the facts of this case, as set out in the opinion, the transaction is held not to constitute a mortgage but only an option to repurchase which plaintiff could exercise or not at her pleasure.

N. R. PATTERSON for appellant.

JAMES M. GILBERT and B. B. GOLDEN for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellee, Maggie Miracle Stone, owned a tract of land containing about seventy acres in Bell county, near the village of Page, which she had purchased from John Wesley Daniel. He brought suit in the Bell circuit court to enforce the collection of the balance of the purchase money amounting to \$1,500.00. Mrs. Stone defended that suit and employed the law firm of Metcalfe & Jeffries to represent her, and their defenses were denied in the lower court and its judgment was affirmed on appeal to this court. The land was advertised for sale by the master commissioner of the Bell circuit court on February 7, 1916. On the day of the sale, and before it was made, John C. Buell, the father of Mrs. Stone, who once owned the land and at that time resided on it with his daughter, and who acted as the agent for his daughter throughout the litigation, approached the firm of attorneys to sign the sale bond of Mrs. Stone, if she should purchase the land from the commissioner, but they declined to do so. It was then agreed that one of the attorneys would bid at the sale and if he was the successful bidder, John C. Buell, or his daughter, Mrs. Stone, would be given the option to purchase the land upon payment of the bond with interest on or before its maturity, which was six months from that day. Accordingly, Mr. Jeffries, a member of the firm, attended the sale and made a bid of \$1,871.12, which was accepted by the commissioner, it being the highest bid, and he became the purchaser. Either before or just after the sale, Mr. Jeffries executed and delivered to Mr. Buell this writing, (caption, date and signature omitted):

“The undersigned, James H. Jeffries, of Pineville, Kentucky, having on this day with the consent of the de-

fendants purchased at master commissioner's sale in the above styled action the tract of land lying in Bell county, Kentucky, at the mouth of Hances creek, and fully mentioned and described in the petition and judgment in the above styled cause, to which reference is here and now had, at and for the sum of eighteen hundred, seventy-one and 12-100 dollars (\$1,871.12), together with legal interest thereon from date until paid, and executed to L. K. Rice, master commissioner, a sale bond for the amount of said sale, payable in six months from this date:

"Now, therefore, this option witnesseth: That the said James H. Jeffries has agreed to and with the said Maggie Miracle Stone, that if she or her father, John C. Buell, or their assignees shall pay off and discharge the said sale bond of \$1,871.12 and the interest thereon, on or before the date of maturing thereof, and pay on or before said date to the undersigned the additional sum of \$200, then the undersigned will transfer his bid and purchase of said property to the defendants herein, or to their assigns, and cause same to be conveyed to the defendants, or their assigns by this court's commissioner."

It is not explained in the record why, but it appears that Jeffries paid the bond after the sale was confirmed and a deed was executed to him by the master commissioner, and on June 19, 1916, he wrote a letter to Mr. Buell calling his attention to the fact that the option would expire on August 7, thereafter, and that if he or his daughter desired to exercise the option they should be prepared to do so by that time or it would be too late. No response was received to that letter and Mr. Jeffries wrote Mr. Buell another one on July 21 thereafter, in which attention was called to the first letter and to the date of the expiration of the option, and in which it is stated, "Unless you arrange to repurchase the property or find a purchaser for it before your contract expires you will lose all right to do so, and I will be compelled to find a purchaser for the property." On August 5, following the last letter, Mr. Buell wrote Mr. Jeffries that he would be in Pineville on August 7 "to take up and settle the matter referred to by you." Jeffries was away from home at that time as well as on August 7, and Buell testified that he went to Pineville on that day but did not find Mr. Jeffries. He does not testify, however, that he was prepared on that day to make the payment stipulated in the bond. After Mr. Jeffries' return home and on Aug-

ust 11, he again wrote Mr. Buell saying: "I returned home this morning from my trip to Perry county, and I will arrange to be here Monday, August 14, when I suppose you will be back to town for the purpose of closing up the matter which you came down to see me about on last Monday." Jeffries testified that he saw Mr. Buell in Pineville on August 14, and that he stated that he was then trying to arrange for the money and would call on Mr. Jeffries at his office later in the day, but he never came and nothing more was said by him or Mrs. Stone about the matter either verbally or by letter. On the 17th of August, Jeffries sold the land to the appellant and defendant below, E. W. Miracle, for the sum of \$2,150.00. On the 3rd day of November of the same year a writ of possession issued and defendant obtained possession thereunder.

On June 21, 1917, the plaintiff (appellee) brought this suit against defendant (Miracle) and in her petition she briefly stated the facts leading up to the sale of the land and set out *in hac verba* the writing copied above, and averred that the \$200.00 mentioned therein was no part of the agreement, and she sought to repudiate the contract to that extent. She further alleged that the copied contract constituted Jeffries her trustee, and that he held the title to the tract of land in trust for her, and that the price he bid for it was grossly inadequate, and that she did not procure others to bid thereon because of the agreement with Jeffries; that defendant at the time of his purchase from Jeffries had actual knowledge of the nature of the latter's title and of his contract with plaintiff and was fully aware of the circumstances under which he purchased the land at the decretal sale, and she averred that she tendered and offered to pay into court the \$1,871.12 with interest, but expressly denied the right of either Jeffries or the defendant to claim a lien on the land for the \$200.00, or to collect from her any part of that sum as a condition precedent to her right to redeem. Further claims were made concerning rents and for waste committed by the defendant since he acquired possession. The answer denied the averments of the petition and asserted a claim for improvements, and upon trial, after proof heard, the court held that Jeffries was only a mortgagee of the land under his contract with plaintiff, and that defendant had knowledge of the facts at the time he made his purchase, and after settling the

issues as to rents, profits and improvements rendered judgment in favor of defendant for the sum of \$2,500.00, and gave him a lien upon the land with the right to plaintiff to pay the judgment and to have a deed from defendant which he was directed to execute by a specified time and if he failed to do so the master commissioner of the court was ordered to execute one to the plaintiff upon payment of the judgment, otherwise the land was ordered sold. Complaining of that judgment the defendant prosecutes this appeal.

From the brief recitation of the facts which we have made it will be seen that plaintiff does not rely in her petition (as held by the court) that the transactions between her and her father on the one part, and Mr. Jeffries on the other, constituted a mortgage for the securing of a debt, although she seeks to establish her right to pay that debt and be adjudged the owner of the land. The only principle upon which she seeks to establish her title to or ownership of the land, is that Jeffries by the transactions referred to became her trustee and was vested with the title to the land only as such, and that under the arrangement she had with him the trust only lasted till she paid him the \$1,871.12 and interest, at which time it would terminate and she seeks the right to do so by making that payment. The learned judge who tried the case did not rest his judgment upon any such theory, and we think correctly so. If the agreement between plaintiff and Jeffries, whether oral or in writing, had been to the effect that the latter would purchase the land for and on behalf of the plaintiff, thus constituting himself in fact and in law a trustee for her, there could be no doubt as to the existence of the relationship of trustee and *cestui qui trust*, but the written option heretofore copied discloses no such agreement, and it is the only agreement which plaintiff relies on in her petition, and the only one introduced or offered to be introduced in the proof, since neither plaintiff nor her father, or any other witness testified to any different transaction or facts than those embodied in that writing. Confining ourselves to it alone (as we are compelled to do under the state of the record) we find no room for the declaration of a trust.

Whether the court in this condition of the pleading was authorized to adjudge the transaction a mortgage, as was done, we will not attempt to determine, since the question is not presented or argued by either side, and

they have treated the case as though the court possessed such authority and which we will assume in disposing of the case.

This brings us, then, to the vital question involved, which is, whether the transaction, as evidenced by the copied writing, created the relationship of mortgagor and mortgagee, or was it only a conditional sale to become an absolute one upon the failure of plaintiff to make payment within the time agreed upon? We feel that we may safely say that there is no other single question upon which there is a greater diversity of opinion among the courts than the one now before us, as is evidenced by the 592 pages of annotation to the case of *Mintz v. Soule*, 1916B L. R. A., 15, from 182 Mich. 564. There are reported in the same volume just immediately preceding the Michigan case those of *Hobbs v. Rowland*, 136 Ky. 197; *Johnson v. National Bank of Commerce of Tacoma*, 65 Washington 261; and *Morton v. Allen*, 180 Ala. 279, which last three cases deal with the question here involved in some of its phases. On pages 87 and 222, of the annotation referred to, it is pointed out by the writer that the opinions of this court, beginning with the case of *Reed v. Landsdale*, Hardin 6, and extending to *Castillo v. Macbeth*, 162 Ky. 382, are perhaps as much at variance with each other as the opinions of the different states; at least they are so upon some one or more of the different phases of the question, such as the right to establish by parol evidence facts necessary to convert a writing, absolute on its face, into a mortgage; the presumption arising from the absolute quality of the transaction; whether it is necessary to admit such parol evidence that an allegation of fraud or mistake in the execution of the writing be alleged, and various other points incident to and growing out of the main question. But, a *resume* of our opinions, as well as foreign ones, will show that certain rules are practically agreed upon, among which are: that the question whether the transaction shall be construed as a mortgage, or a conditional sale, is one primarily to be determined by the intention of the parties to be gathered from such evidence as the record legally contains; that in case of doubt it should be resolved in favor of declaring the transaction a mortgage, but that in order to do so the relation of debtor and creditor must exist, and that the obligations of the parties must be mutual, i. e., that if the transaction be such as that the vendor

(debtor) may treat the transaction as a mortgage, so may the vendee, the alleged creditor. A few cases seem to deny the last two propositions, but none of them is from this court. Some of the numerous cases from this court (besides those above) wherein the question under consideration was involved in some of its phases are: *Harrison v. Lee*, 1 Litt. 191; *Prince v. Veardon*, 1 A. K. M. 169; *Kenney v. Marsh*, 2 A. K. M. 46; *Flowers v. Sproule*, *idem*, 54; *Edmonton v. Harper*, 3 J. J. M. 553; 20 A. M. Dec. 145; *Honore v. Hutchins*, 8 Bush 687; *Allen v. Brown*, 23 Ky. L. R. 217; *Spicer v. Holbrook*, *idem*, 1812; *Fulwilder v. Roberts*, 26 Ky. L. R. 297; *Sheffield v. Day*, 28 Ky. L. R. 754; *Tigret v. Potter*, 97 Ky. 54; *Sebree v. Thompson*, 126 Ky. 223; *Tucker v. Witherbee*, 130 Ky. 269; *McKibben v. Diltz*, 138 Ky. 684; *Charles v. Thacker*, 167 Ky. 835; *Carr v. Morrison*, 178 Ky. 683, and *White v. Nicholason*, 184 Ky. 335. Numerous others are cited in the ones referred to and in the annotation *supra*.

Manifestly it would be impossible in this opinion to examine each of the cases and to undertake to differentiate the facts of each or to reconcile the principles announced therein, since to do so would require the writing of a lengthy thesis upon the subject. Some of the questions presented, discussed and determined in many of them are not presented in this record, prominent among which are, when may parol testimony be received, and the effect to be given it? These questions are eliminated from the instant case, since (as we have seen) plaintiff plants her right to relief upon the written option contract, inserted above, and she neither introduced nor offered to introduce oral testimony affecting or modifying it in any particular. Clearly, there should be some decisive tests and distinctive characteristics fixing the line of demarcation for the guidance of the court in determining to what category a particular transaction belongs, so that the case could be readily classified and disposed of accordingly. Otherwise, each case would be determined by the peculiar notions of equity entertained by the court as constituted at the time it was decided, and the law on the subject would be void of that stability and fixedness so essential to its maintenance as a symmetrical science, and without which the law relating to the subject would degenerate into an utterly chaotic condition. Hence, we find many of the decisions, as well as text writers, announcing these de-

cisive tests to determine whether the transaction shall be treated as a mortgage or a conditional sale; (1) that to construe the transaction as creating a mortgage the relation of debtor and creditor must exist either because of a prior debt, or one simultaneously created, or one agreed to be created in the future; (2) to constitute a mortgage the transaction must be such as that the rights as well as the remedies of the parties are mutual, i. e., if the alleged mortgagee may treat the transaction as a mortgage and is possessed of all of the rights and remedies incident thereto, the vendor (the alleged mortgagee) must also possess the same rights and remedies. Growing out of this is the right of the latter to sue the alleged mortgagee to recover the debt and to enforce his lien upon the property involved. He can not do this unless there is contained in the transaction a promise by the mortgagee to pay him the stipulated sum on or before the fixed time, and in the absence of such a promise he can not maintain such suit and the mutuality of rights and remedies are wanting, and (3) even if the relation of debtor and creditor existed at the time of the transaction, if it extinguished the debt then that relation is destroyed and the sale may not be subsequently treated as a mortgage. There may be, under the peculiar facts of the particular case, other tests, but the three mentioned seem to be adopted by the greater number of courts and by the best reasoned opinions. Thus in 27 Cyc. 1008, the text says: "No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt or the performance of a duty, either existing at the time of execution or to be created or to arise in the future. Hence a deed which is absolute in its terms can not be converted into a mortgage without proof of an obligation to be secured by it, either in the form of an antecedent debt between the parties, or a loan, debt, assumption of liability, or contract for future advances contemporaneously made." And on page 1003 it is further stated: "If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed of the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance or not to do so, he has not the rights of a mortgagor, but only the privilege of repurchasing the property. And if it appears that the deed was accepted in payment and satisfaction for an existing debt, the

agreement for a reconveyance on payment of a given sum can not convert it into a mortgage." In 19 R. C. L. 266, supporting test (2), the text says:

"But in practice the line of demarcation between the two is shadowy, and it is frequently a matter of great difficulty to determine to which category a given transaction belongs. However, there is a test generally accepted as decisive, and this is the mutuality and reciprocity of the remedies of the parties—that is to say, if the grantee enjoys a right, reciprocal to that of the grantor to demand reconveyance, personally to compel the latter to pay the consideration named in the stipulation for reconveyance, the transaction is a mortgage; while if he has no such right to compel payment, the transaction is a conditional sale. This test is a derivation of the consideration that personal liability of the grantor is regarded either as the *sine qua non* of a mortgage or as a factor whose existence or nonexistence points strongly to the fact that a conveyance is or it not a mortgage."

In the Tucker case *supra* from this court it is recognized that parties competent to contract "can agree upon terms that will amount to a conditional sale;" and the court recognized the necessity of the relation of debtor and creditor, since the opinion says: "But, where the instrument is intended as security for the payment of a debt, and the relation of debtor and creditor exists between the parties, the legal inference is that a mortgage, and not a conditional sale, was intended." And this result will follow although the instrument be absolute in form, provided the intention is to secure the payment of money, "and (says the court) the relation of debtor and creditor exists between the grantor and the grantee at the time of its execution. . . But, where no such relation exists, and the grantor and grantee at the time of the execution of the deed agree in writing that the grantor shall have the option to repurchase in a given time at a certain price, the transaction will be deemed a conditional sale." Further along in the opinion, the court, quoting from *Honore v. Hutchins, supra*, said: "The distinction between a conditional sale and a mortgage as drawn by *Greenleaf* is that 'where the debt forming the consideration of the conveyance still subsists, or the money is advanced by way of a loan with personal liability on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will

be regarded as a mortgage; but, where the relation of debtor and creditor is extinguished, or never existed, there a similar agreement will be considered as merely a conditional sale." The same quotation from the *Hutchins* case was incorporated in the opinion in the case of *Charles v. Thacker*, *supra*, and in addition thereto the court in that opinion quoted and adopted from 4 Kent 145, thus: "If the relation of debtor and creditor remains, and the debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of repayment, if he pleases, by a given time, and thereby entitles himself to a recognition, it is a conditional sale.'" Further along in the same opinion the court said: "The true test, therefore, whether a conveyance is a mortgage or not, is to ascertain whether it is a security for the payment of money, or for the performance or non-performance of any act or thing. If the transaction resolves itself into a security, whatever be its form, it is, in equity, a mortgage. If it is not a security then it is either an absolute sale or a conditional purchase. If the debt is extinguished, leaving the grantor to pay or not, as she chooses, and thereby entitle himself to a reconveyance, the transaction operates as a conditional sale. *Horbach v. Hill*, 112 U. S. 144." These same principles were approved in the late case of *Carr v. Morrison*, *supra*, and from them it would seem that this court in its later opinions has adopted the three distinctive tests enumerated above to guide it in placing the particular case under consideration in the proper category to which it rightfully belongs.

Perhaps the strongest case in favor of construing the transaction as a mortgage is that of *McKibben v. Diltz*, *supra*, but there appeared in that case many controlling facts and circumstances not appearing in the one now under consideration. The court there held that under the facts of that case *McKibben*, who purchased the land with the defeasance agreement, became a trustee for the rightful owners with the right in himself to operate the land until the defeasance period and then render an accounting according to the terms agreed upon, which, as stated, the court held created the relation of debtor and creditor.

Coming now to apply the above principles to the facts of this case we find that the only fact which might be construed as creating the relation of debtor and creditor

is the stipulation in the option contract for the payment of the \$200.00 attorney's fee, but plaintiff in her petition renounces that stipulation and avers that it was no part of the agreement. On the contrary Mr. Jeffries refused to enter into that relationship when he declined to become surety for plaintiff on the sale bond to be executed by her should she purchase the land. If, however, we should take the opposite view and consider the case as if the relationship existed at the time then that item was extinguished upon the failure and refusal of plaintiff to exercise the option. Furthermore, the transaction here involved does not create a mutuality of obligations. Nowhere does it appear that plaintiff ever promised, orally or otherwise, to repay Jeffries any of the items mentioned in the option contract. That writing (which is the only contract involved, as we have seen) purported to and did only give her the option to repurchase the land at the sum designated therein and within the time stipulated which she could exercise or not at her pleasure. Neither do we think the alleged inadequacy of price (a circumstance sometimes considered in determining the intention of the parties and the nature of the transaction) should control our judgment under the facts of this case. Upon that issue, as is usually the case, the testimony is contradictory; some witnesses introduced by plaintiff fixed the price much higher than the bid of Mr. Jeffries, while an equal, or perhaps a greater, number of witnesses residing in the vicinity and who own land fixed the value at not exceeding \$2,000.00. But, there appears in the record a very persuasive circumstance bearing upon the issue, which is that the same tract of land was sold three times within a comparatively short time at public sale and the highest price bid at any of the three sales was \$2,250.00.

Measured by the above tests the transaction here involved can not be considered as a mortgage nor, as we have seen, did it create the relation of trustee and *cestui qui trust*. The court erred, therefore, in rendering the judgment appealed from and it is reversed with directions to dismiss the petition.

Wood v. Corcoran, Admr., etc.

(Decided February 25, 1921).

**Appeal from Kenton Circuit Court
(Criminal, Common Law and Equity Division).**

1. **Wills—Scintilla Rule—Mental Capacity.**—The scintilla rule prevails in will contest cases the same as in others and applies to the issue of mental capacity of the testator as well as to other issues in such cases; but the quantum of testimony necessary to raise a scintilla of evidence must be such as to induce conviction and not consist in vague, uncertain and isolated acts and circumstances which are consistent with rationality, although they may be inconsistent with the usual normal course pursued by the generality of mankind. It is furthermore the trend of later opinions of this court, in applying the scintilla rule in will contests and in other cases, to discard the illogical practice of drawing a distinction between the quantum of testimony necessary to create a scintilla of evidence and the quantum necessary to sustain a verdict as not being flagrantly against the evidence.
2. **Wills—Mental Capacity—Burden of Proof.**—Where a will is rational and equitable upon its face the burden is upon the contestant to sustain the grounds of contest and in such cases non-expert witnesses may give their opinions concerning the testator's mental capacity, but such opinions not based on sufficiently convincing facts to support them will not authorize the setting aside of the will, but where the facts testified to by such witnesses are sufficient, when measured by common experience, to show a derangements of mind, their opinions based upon such facts (as strengthened by the facts themselves) will authorize a submission of the issue to the jury and, unless overcome by sufficient testimony, will sustain a verdict setting aside the will.

MYERS & HOWARD for appellant

MAURICE L. GALVIN, JOHN T. MURPHY and WILLIAM A. BYRNE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellant, Isabella Wood, a distant relative of Mary J. Reynolds, deceased, prosecuted an appeal to the Kenton circuit court from a judgment of the Kenton county court, probating the will of the decedent, seeking a reversal of the probate judgment upon the sole ground that the testatrix, at the time of the execution of her will (January 16, 1911) and at the time of the execution of the codicil thereto (September 6, 1915), was of such unsoundness of mind as incapacitated her in law to execute

either of them. The contestees, consisting of the administrator with the will annexed (the nominated executrix refusing to qualify) and the devisees therein denied the grounds of contest and the court at the conclusion of all the evidence sustained their motion for a peremptory instruction directing a verdict sustaining the will and the codicil and upon the verdict returned in accordance therewith judgment was rendered, to reverse which contestant prosecutes this appeal.

It will thus be seen that the principal question for determination is one of fact, which must be solved from the testimony introduced and an application of the law as announced by this court relating to testamentary capacity to the facts. An examination of the cases from this court involving will contests upon this and other grounds (upon some of the most recent of which the court based its judgment, and which we will hereafter refer to) will demonstrate that in the main each case must depend upon its own peculiar facts as disclosed by the testimony and, as we construe the cases, there is no difference between the quantum of testimony necessary for the submission of the case to the jury of the issue of mental capacity of the testator, and the issue of undue influence, as was held by the trial court. It concluded that in the later opinions of this court it was held that the rule commonly known as the "scintilla rule" did not apply to the issue of mental capacity of the testator, but did apply to that of undue influence. We find no such distinction in our opinions; but there has been a marked tendency of late in will contests, as well as in other cases, to modify the scintilla rule, as it has sometimes been applied in former cases, so as to enlarge the quantum of evidence necessary to create it, and to narrow the difference between that evidence and that deemed necessary to save a verdict from attack upon the ground that it is flagrantly against the evidence, and to bring the two nearer together. In other words, this court has, in recent years, approached toward the conclusion (not yet adopted) that there is no logical reason for submitting a case to the jury, under the doctrine of the scintilla rule when a verdict, supported only by a scintilla of evidence, would be set aside as flagrantly against the testimony. Cases pointing in that direction are, *Crump v. Chenault*, 154 Ky. 187; *Poll v. Patterson*, 178 Ky. 22; *Langford v. Miles*, 189 Ky. 515, and others referred to therein. It is only to this extent has there been any modification of the practice in the particulars referred to.

The later cases cited by counsel, and which it is said controlled the trial court in rendering the judgment appealed from, are Cecil v. Anheir, 176 Ky. 198; Schrodtt v. Schrodtt, 181 Ky. 174; Bailey v. Bailey, 184 Ky. 455 and Trustee of Epworth Memorial Methodist Church v. Overman, 185 Ky. 773. To these may be added the still later one of Langford v. Miles, *supra*. It was, 'in substance, held in those cases that where a will was rational and equitable upon its face the burden was upon the contestants to establish the grounds of contest, including that of mental incapacity, and that such burden was not discharged by the introduction of evidence wanting in substance and relevant consequence, and which consisted only in vague, uncertain or irrelevant matter not carrying the quality of proof nor having fitness to induce conviction, and further, that the *opinions*, as to the mental capacity of the testator, of non-expert witnesses alone in the absence of facts supporting such opinions would not authorize a submission of that issue to the jury, nor would facts of the non-probative nature, as above indicated and upon which the opinions of the non-expert witnesses were based, authorize such submission. A reading of the cases above cited, and those referred to therein will show that this court has consistently held that occasional and isolated facts concerning the actions and conduct of the testator which prove no more than to show him an eccentric individual, or as one curious and queer in his disposition and conduct, or whose actions which may be somewhat out of line with the course of conduct usually pursued by the generality of mankind, will not, of themselves, be sufficient to establish mental incapacity; but it has never been held that where the proven acts are so far afield, and constitute such a wide departure from the usual course of conduct of normal individuals as to indicate a derangement of mind, the case should be taken from the jury, although the witnesses testifying to the facts were non-experts and their opinions based upon such facts were the only opinions proven in the case. In some of the cases referred to, opinions were ventured by the witnesses, but neither they nor any other witnesses testified to any irrational act or conduct on the part of the testator; while in others of them it was held that the supposed irrational acts or conduct, testified to, were not such, because they did not show a sufficient departure from rational conduct to authorize a finding of mental incapacity.

In this case the testatrix was 78 or 79 years of age when she executed the will and about 83 years of age when she added the codicil. She was born in Ireland and moved to this country while quite young and married in this country, her husband dying some 18 or 20 years before her death. From that time on she largely lived the life of a recluse, occupying some property left to her, perhaps by her husband, located in Covington. She had no children nor relatives, except appellant and her daughter and the latter's children. Testatrix seems to have been considerably attached to the appellant and her daughter, both of whom were widows, and frequently visited them at their joint home in Cincinnati, Ohio. In 1914 testatrix suffered a stroke of paralysis and was carried to a hospital in Covington, Ky., where she remained nine weeks. Immediately appellant's daughter went to nurse her and did so until the expiration of the nine weeks' confinement when testatrix was moved to the home of appellant and her daughter in Cincinnati, where she lived some eighteen months, when all of them removed to the property of testatrix in Covington, which they jointly occupied till the latter's death in 1918. The testatrix was practically helpless after the stroke of paralysis and had to be tenderly cared for constantly thereafter, all of which services were cheerfully rendered by appellant and her daughter.

The will devised to appellant's daughter \$500.00, and the codicil gave the daughter the right to occupy free of rent the house where testatrix died for a term of three years after her death. The appellant was given in the will only one dollar, and the remainder of the property, after the payment of funeral expenses and debts, was devised to charitable purposes.

Without stating in detail the testimony of the witnesses for appellant, it is sufficient to say that some seven or eight of them (not including interested parties) testified in substance, and without contradiction, that the testatrix was penurious, curious and exceedingly eccentric; that she was very much of a recluse, scarcely ever leaving home and was exceedingly slovenly in her dress, on some occasions going upon the streets with her clothing wrong side out; that prior to, at the time of, and succeeding the execution of the will she almost constantly was engaged in the most unnatural conduct of crying, giggling, singing and dancing by herself and while alone in her room, and also in the back yard of her premises in the day time, and that these different varieties of acts and

conduct followed each other in rapid succession and would frequently be accompanied with loud laughter on her part. She was seen by a witness sitting on her front porch late at night dressed in her night robes with the thermometer around zero. They all testify that in her conversation she would frequently lose the subject and go to another one, thereby talking very disconnectedly. In return for a favor, she carried on one occasion to a neighbor, a dish consisting of stewed potato peelings and lemon rinds, and she told some of the witnesses when her eyesight began to fail that her eyes were filled with little devils, and she at least one time was seen praying and singing to the clock in her room. She was indifferent about the character of clothing she wore. According to some of the witnesses, she would wear heavy clothing in the summer time and light ones in the winter time. In papering one of the rooms of her house she put one kind of paper on one wall and another kind on the other one. Some of the witnesses furthermore testified that for at least some years prior to the execution of the will the testatrix had a blank, imbecile look on her face, which they were unable to describe, but which they pictured in such a way as to carry conviction, provided the witness was telling the truth. Other acts of conduct, equally as far removed from that of an undoubtedly rational person, are testified to, and while, perhaps, a single instance of the happening of either of them might not be sufficient to uphold a verdict setting aside the will, we are by no means prepared to say that all of them considered together, with some of them so frequently engaged in as to show an almost constant practice of the testatrix, did not constitute sufficient evidence of mental unsoundness to submit that issue to the jury, or to uphold a verdict sustaining that ground of contest. It is true that the draftsman of the will, a physician, the witnesses to the will and some others stated, in substance, that while the testatrix was curious, queer and eccentric, that they regarded her mind as strong as it had always been and that, according to their opinions, she possessed testamentary capacity. About these witnesses it may be said, however, that they were very infrequently with or about her, while the witnesses testifying for appellant, as above indicated, were her near neighbors and associates, some of them living in the same house with her, while others resided in an apartment adjoining hers. But, be this as it may, the question before

us is whether there was sufficient testimony to authorize a submission of the case to the jury, and we entertain no doubt but that the answer should be in the affirmative.

It results therefore that the judgment should be and it is reversed with directions to grant a new trial and for proceedings consistent with this opinion.

Wells v. Lewis, Admr.

(Decided February 25, 1921).

Appeal from Caldwell Circuit Court.

1. Wills—Sufficient Testamentary Character of Letter.—In a letter stating the writer did not expect to live long and that in the event she did not get to make a contemplated visit to town she wanted certain disposition made of her property, is of sufficient testamentary character as to authorize its probate as the last will of the writer.
2. Wills—Signature.—The signature "Ant nanie" to a letter, construed as a will, is a sufficient signature of the writer's name.
3. Wills—Requisites and Validity.—No particular form is required for the disposition of property by will. The distinguishing feature of all testamentary documents is that the writing must appear to have been written *animo testandi*.
4. Wills—Testamentary Capacity—Execution.—Ordinarily the only proper and necessary matters to be considered and determined in proceedings to probate a will are the testamentary capacity of the testator, the due execution of the will in accordance with statutory requirements and the presence or absence of fraud, mistake or undue influence.

JNO. C. GATES and R. W. LISANBY for appellant.

J. ELLIOTT BAKER for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

The sole question involved on this appeal is whether the following letter is of such a testamentary nature as that it should have been admitted to probate as the last will of Nannie Rodgers. The county court declined to so admit it. An appeal from this order to the circuit court was, on motion of appellee, dismissed, hence this appeal.

The letter is as follows:

"tom i cant rite much but i must tell you something
for i cant slep at nite or rest a tal i took thing from: there

that was not mine i feel bade over it i cant tel them they are so good to me jon is going with me to ton to take my eggs and i am going to fix thing rite i am not wel an if i dont get to go i want you to give it to them the mony i got out ov the lan an the rest ov it to yu no how much of the tobucker mony the was i want them to have it al back mr rogers tol me how he wanted eve thing fix but i woden tel it it al be long to them but wat i live on jon is so good to me it worry me so i cant slep or rest til i get it fix i dont fel like i wil live long and por pet i dont no wat wil be com of him dont let him go to the por hose an tom this plas is yor Ant Ader give it bac to her i ant don her rite O i cant rest but i cant tel jon an Ader i have don them so bad tom do this fer me i dont no wer yu can red it but i dont want no body to no it but yu i have trid to rite it mi self good by tom

“Ant nanie.”

Several reasons are given why said paper should not be considered testamentary in nature, among others (a) that the beneficiaries are not named in the writing and therefore were too uncertain and indefinite; (b) the property is not sufficiently described; (c) it is void for uncertainty and (d) it was not intended as a disposition of the writer's estate after death.

The signature “Ant nanie” is sufficient. As said in Page on Wills, sec. 172:

“The testator may sign his name by writing it out in full or by abbreviating it, or by writing his initials or his Christian name, or by using an assumed name where not done with intent to deceive.”

In *James A. Knox's Appeal*, 131 Penn. St. 220, 18 Atl. 1021, 6 L. R. A. 353, the signature of the given name of testatrix was held sufficient, as likewise in *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982. Nor will misspelling of the name signed invalidate the will. *Word v. Whipps*, 16 Rep. 403, 28 S. W. 151.

A will is an instrument by which a person makes disposition of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during life. 1 *Jarman on Wills*, 5th Ed. p. 26. No particular form is required for the disposition of property by will; the distinguishing feature of all testamentary documents is that the writing must appear to be written *animo testandi*.

In Jarman on Wills, 5th Ed. p. 33, it is said:

“The law is not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.”

Endorsement on the back of a note was held in Morrison, etc. v. Bartlett, etc., 148 Ky. 833, 147 S. W. 761, 41 L. R. A. N. S. 39, to be sufficiently testamentary in its character as to justify its probate by the county court. In Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, a deed not to take effect until the death of certain named persons was construed as a will.

There are many decisions of courts of last resort in which letters have been construed as wills. 40 Cyc. 1092. As an illustration, Milam, etc. v. Stanley, etc., 33 Rep. 783, 111 S. W. 296, 17 L. R. A. (N. S.) 1126, may be cited. In this case it appears W. R. Fletcher had been convicted of the crime of rape, found guilty and sentenced to be hanged. Impressed with the fact that his earthly dissolution was imminent, his petition for executive clemency having been denied, he wrote the following letter to his daughters:

“My dear Loving Daughters:

“I guess my last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I think I am prepared to go and want to ask one thing of you all is to meet me in heaven. Jennie, Lula and Bettie and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven, and it does me good to know that God knows that I am not guilty. Jennie tell John to see that my body is taken home and buried in our own graveyard, and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot, and I don't want you or her to ever have any trouble over it. Jennie, I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother

so good. I hope to soon meet her in heaven. Jennie Mary has got enough of my money to bury me I guess. So this is from your loving father.

“W. R. Fletcher.

“To Jennie and Lula, may God bless you all, is my prayer.

“Yours, W. R. F.”

In treating this as the last will of the writer the court says he did not have in mind that he was thereafter to make his daughters a deed to the home and lots; he wished them to have the property and not to have any trouble over it, thus indicating he had in mind not something he intended to do in the future, but something he was then doing.

In *Webster, etc. v. Lowe, etc.*, 107 Ky. 293, 53 S. W. 1030, the following letter was held to be the will of James Lowe:

“I was born December 28, 1804, . . . I purchased a house and lot, and I, my mother, wife, and Charley Webster moved into town in 1859. I bought the property on Third and Main, left Charley some money, and he entered the grocery business. Our arrangement was that he could have the use of the building as long as he may require it, so that it brought me in ten per cent. on the purchase, which was \$1,550. The rent has been paid regularly. He has done much improvements about it, and I have requested my executors to give a clear deed for the property, after my death, to Maggie his wife and Charley.”

The court in its opinion, among other cases, cites *Clarke v. Ransom*, 50 Cal. 595, wherein the following words were held to be testamentary and the writing containing same admitted to probate:

“Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon.”

A paper reading: “Mrs. Sophie Loper is my heiress. G. Ehrenberg,” was held to be a will in *Succession of Ehrenberg*, 21 La. Ann. 280, 99 Am. Dec. 729. Likewise a writing in these words, to wit:

“It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description, David Outlaw,” was declared to be a will in *Outlaw v. Hurdle*, 1 Jones L. 150 (N. S.).

The court in *Webster, etc. v. Lowe, supra*, says it is not necessary to the validity of a will that it contain the words "give," "will," "bequeath," etc., as the testator's intention and purpose may be gathered from other language employed.

In *Cowley, etc. v. Knapp, etc.*, 42 N. J. L. 297, (8 Vroom) the following was held sufficiently testamentary in character to be entitled to probate:

"My dear Father:

"In case anything happening to us, I would wish you to take charge of our property. By law, I suppose it would be divided between all my sisters. I would wish it otherwise. I wish all the property to be sold except any portion of Deal Emma would wish to retain for herself; then the money to be put in government securities, or any other sure investment. I make Emma Knapp my sole heir. I know she is just, and will give to those who need, and will be guided entirely by your advice.

"Your affectionate daughter,
Mary Boyle,
120 East 26th Street."

Testatrix and her husband both died while traveling and the court held the title to the premises passed to Emma Knapp.

In *re Ledford's will*, 176 N. C. 610, 97 S. E. 482, the following paper was ordered probated as a will.

"3-9-18.

"Mr. J. B. Ivey, Charlotte, N. C.

Dear Sir:

"Please administer on my estate and I want my wife (Ella Gnatt Ledford) to have everything I own, but invest it or fix it so she can get it as she needs it so she can not lose it.

"Please look after Ella and the children and see that they have what is necessary and do not suffer. (Here follows an itemization of the estate.)

"All I owe is a \$5,000 note at the Bank of Cooleemee.

"I am on one note as security and it is for \$400 for A. K. Walker.

"My notes, insurance policies, stock certificates, are in a tin box in the Bank of Cooleemee, and I have a personal drawer in the safe of J. N. Ledford & Co., with papers in it.

"Please do the very best you can for my wife and children. Fix my property so my wife will have plenty as long as she lives and there is enough.

"J. N. Ledford (seal)"

In line with the foregoing we think it evident the writing in question should have been admitted to probate as the will of Aunt Nannie Rodgers. The writer was mindful of her inability to express herself clearly. Her simplified and phonetic spelling is indeed unique, but withal expressive of a desire to right a wrong that had been done. She was not well at the time, and did not expect to live long and sickness we are told prevented her from taking her eggs and making the contemplated trip to town with her stepson John. She indicated and directed in her crude way what disposition to make of certain of the property in the event she did not get to town. That it may be difficult or impossible to positively identify some of the beneficiaries or fix the amount due is not involved here. We are concerned on this appeal solely with the matter of probate.

Ordinarily the only proper and necessary matters to be considered and determined in proceedings to probate a will are the testamentary capacity of the testator, the due execution of the will in accordance with the statutory requirements, and the presence or absence of fraud, mistake, or undue influence. Matters of interpretation and construction, as well as the validity of particular bequests and devises are not involved. 40 Cyc. 1231; Yates' Will, 2 Dana 215; Kelly v. Kelly, 5 B. Mon. 369; Thompson on Wills, sec. 498.

We are satisfied upon the showing made that a *prima facie* case for probate was established. It sufficiently appears from the letter that the writer was endeavoring to make a disposition of her property testamentary in character.

For the reasons given the judgment will be reversed for further proceedings consistent herewith.

Farley, et al. v. Alderson, et al.

(Decided February 25, 1921).

Appeal from Elliott Circuit Court.

Parties—Bringing in New Parties.—Where in an action, with the parties, who are before the court, a complete determination of the question involved can not be had without necessary parties being brought before the court, the court should require them to be made parties, or else dismiss the action without prejudice to another action.

M. M. REDWINE, J. T. REDWINE, E. C. O'REAR and W. G. DEARING for appellants.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.

This was an action by Rachel Farley and her husband and children, seven or eight in number, against Harve G. Alderson, father of Rachel Farley, and grandfather of the other appellants, his wife Mary Alderson, John Ellis, Mary Ellis, Rachel Armstrong, Neville Armstrong, John D. Alderson, Albert H. Alderson and Charles L. Alderson, who are heirs and descendants of Warren Alderson, to reform a deed which was executed by Warren Alderson to appellants, for a tract of land, and for a construction of the deed, and quieting of the title of the appellants to the land. The appellants, whom we will call the plaintiffs, pray to have certain portions of the deed eliminated, which they assert were included in it by mistake, and if this elimination should be effected, the deed would convey to Rachel Farley a title in fee simple to the land, but if it should be determined that such portions of the deed were not included in it by mistake, but were intended by the grantor to be therein, it is claimed by the appellants that Rachel Farley has a life estate in the land, and the remainder would go to the other appellants in fee, but it is, also, claimed adversely to this contention that the deed is susceptible without reformation, of a construction, which would give to the appellants a joint life estate only, and the remainder interest to all the heirs of Warren Alderson. The circuit court rendered a judgment dismissing the petition and from that judgment this appeal has been prayed. There was no demurrer to the petition. No proof was taken in the case. The court did not assign any reason for its action, nor have the

counsel for appellants in their briefs suggested the ground upon which the court rested its judgment, and appellees have not appeared in this court in any way.

The defendants, John D. Alderson, Albert H. Alderson and Charles L. Alderson, were alleged in the petition to be "of Nettie, W. Va.," and the two latter to be infants and having no guardian or committee. If these three defendants were non-residents of the state, there was no separate affidavit filed, which states such fact, and the name of the place wherein a post office was kept nearest to their place of residence, nor that they were then absent from the state, all of which statements would have been necessary to have authorized a warning order against them or appointment of a non-resident attorney. The petition was verified, and would have served in place of a separate affidavit, but the petition did not contain a statement of the facts necessary to justify the making of a warning order against them, nor the appointment of a non-resident attorney. In fact, there was no warning order made, nor attorney appointed, as provided for by sections 58 and 59 of the Civil Code, although a report purporting to be by an attorney appointed to notify these defendants of the pendency of the action, as provided for by section 59, subsec. 2, Civil Code, and to perform such other duties, relating to them as provided by the Code, was filed, which stated that the attorney had written a letter to them and directed it to Nettie, W. Va., but had received no reply thereto. The report does not indicate what information the letter to the defendants contained, or with what subject it dealt. Also, an answer purporting to be by an attorney, who had been appointed a guardian *ad litem* for Albert H. Alderson and Chas. L. Alderson, the ones alleged to be infants, as though they were residents of the state of Kentucky, was filed, but no order was ever made appointing a guardian *ad litem*, and if such order had been made it would have been unauthorized as the parties for whom the appointment appeared to have been made had never been summoned to answer to the action. Neither of these three defendants entered their appearance to the action in the court below, nor in this court, and hence they could have never been before the court in a way to give it jurisdiction of them. The defendants, John Ellis, Mary Ellis, Rachel Armstrong and Neville Armstrong, were neither of them ever summoned in the action and have not in any way entered their appearances either in the court below or in this

court. Upon motion of the appellants, the plaintiffs below, the court entered an order designating the defendant, Harve G. Alderson, as one of the defendants upon whom summons and notice could be served for all of the defendants, and providing that a summons served upon him should be sufficient to bring all of the defendants before the court for the purpose of the action. A summons was never executed upon him after the making of this order, but he had been served with a summons against him, individually, theretofore. Section 25, Civil Code, provides: "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." Under this provision of the Code, whether the question to be litigated is one of common or general interest; or whether the parties are numerous and it is impracticable to bring all of them before the court within a reasonable time, before one or more of the proper parties to a suit is or may be authorized to sue or defend for all, the parties in interest must at least be numerous, and it could not be pretended that four persons were such a number that it would be impracticable to bring them before the court within a reasonable time. The petition states the name of each of the defendants, and its allegations show that the defendants named in the petition are the only parties in interest, except the plaintiffs. Other than the parties who are designated as being of Nettie, W. Va., and whom it seems it was attempted to bring before the court by the appointment of a non-resident attorney, and a guardian *ad litem* as heretofore stated, the only remaining parties in interest are four in number, other than Harve Alderson, upon whom a summons was served, and manifestly no such state of case is presented as authorizes a court to designate one to defend for all and to attempt to dispose of their rights without opportunity upon their part to have their day in court. Hence of the nine defendants named in the petition, only two of them were brought before the court, and one of them seems to have no interest in the controversy other than the wife of a real party in interest. Section 23, Civil Code, provides: "Any person may be made a defendant who claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination of the action." Section 28, Civil Code, provides: "The court may determine any contro-

versy between the parties before it, if it can do so without prejudice to others; if it can not do so, it must require such other persons to be made parties or must dismiss the action without prejudice." Section 24, Civil Code, provides: "Parties who are united in interest must be joined as plaintiffs or defendants, but if the consent of one who should be joined as plaintiff could not be obtained he may be made a defendant, the reason being stated in the petition."

As a rule in controversies concerning the title to real estate all of the persons who are interested under the title in litigation are necessary parties. Newman, section 180e; Smith v. West, 5 Litt. 48; Huston v. McClarty, 3 Litt. 274; City of Louisville v. Henderson, 5 Bush. 518. It is very plain that the action was in no condition for a trial upon its merits. Of the nine parties whom plaintiff alleges were necessary parties to the action, if a complete determination of the questions in controversy were to be had, only two of them had been brought before the court, and the court could not effectively or finally dispose of the matter without the others having been made parties. To have undertaken to make a determination of the matter with only one of the real parties in interest before the court, and the same procedure was allowable thereafter, it would have required seven other lawsuits to have decided the matter finally if the court could have properly proceeded to determine the issue with only one of the interested parties before the court, and another who possibly at some time might have an interest. In such a state of case, the court should have dismissed the action, but where a dismissal takes place, on account of the failure of the necessary parties to be brought before the court, the dismissal should have been made without prejudice to any future action. The judgment is therefore reversed and remanded with directions to set aside the judgment dismissing the action and to permit the plaintiffs to bring the defendants before the court by the process provided by law, and then a trial may be had upon the merits, and a decision rendered accordingly, but in the event plaintiffs decline to bring defendants before the court, the action should be dismissed but without prejudice to a future proper action.

American Railway Express Company v. Commonwealth

(Decided December 10, 1920.)

Appeal from Harlan Circuit Court.

1. Corporations—Sale of Property—When Purchasing Corporation Not Liable for Debts of Selling Corporation.—A corporation like a natural person may sell its assets and property and when it receives therefor its fair value in money or property the purchasing corporation will not, in the absence of contract obligation, be liable for the debts of the selling corporation.
2. Corporations—Liability of Purchasing Corporation for Debts of Selling Corporation.—When a corporation sells its assets and property without consideration or to defraud its creditors or is merged into a new corporation or the new corporation is merely a reorganization of the old one under a new name or the selling corporation is only paid for what it transfers by stock in the new corporation, the new one will be liable for the debts of the old one.
3. Corporations—Liability of Purchasing Corporation for Debts of Selling Corporation.—When a corporation doing business in this state has in the state sufficient tangible property to pay its debts and it sells all its property to a new corporation and takes in payment therefor stock in the new one the latter will be liable for the debts or liabilities of the old whether in contract or tort or liquidated or unliquidated existing against the old corporation at the time of the sale although the old corporation may have in some other state property out of which its debts created in this state could be collected and retain its corporate existence, but merely for the purpose of winding up its affairs.

ZEB A. STEWART, STOCKTON & STOCKTON, A. M. HARTUNG and TRABUE, DOOLAN, HELM & HELM for appellant.

J. G. and J. S. FORESTER, CHAS. I. DAWSON, Attorney General, and THOS. B. MCGREGOR, Assistant Attorney General, for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Affirming.**

The purpose of this suit which was brought in July, 1919, by the Commonwealth of Kentucky, was to make the American Railway Express Company liable for certain judgments amounting in round numbers to \$4,000.00 obtained by the Commonwealth against the Adams Express Company in the Harlan circuit court. The lower court gave judgment for the amount asked against the American Railway Express Company, and to have a reversal of that judgment it prosecutes this appeal.

There is no question made in the record or in the briefs of counsel for the American company, as it will be called, as to the regularity of the proceedings in which the judgments were rendered against the Adams company or as to the validity of the judgments against it. The reversal is asked upon the sole ground that under the facts and circumstances of the case, the American company should not be made liable for the payment of the judgments against the Adams company.

Nor is there any disputed issue of fact appearing in the record, and this being so the correctness of the judgment appealed from must depend on the principles of law applicable to the case. Before, however, coming to consider the questions of law it will be necessary to set forth the material parts of the pleadings in the case as well as so much of the evidence as shows the circumstances under which the American company acquired the business and property of the Adams company.

The suit was brought by the Commonwealth against the Adams company and the American company and after setting up the judgments against the Adams company and the fact that executions issued on the judgments had been returned by the officer in whose hands they had been placed, "no property found," it was further averred that about June 25, 1918, the defendant American company was organized for the express purpose of taking over and becoming the owner of all the property and rights of the Adams company and other express companies doing a railroad express company business in the United States; that the Adams company on that date transferred and turned over all of its property of every kind, character and description in Kentucky and the United States to the American company and received as the only consideration therefor capital stock of the American company of the par value of \$8,000,000.00; that the Adams company in this transfer and sale delivered to the American company, property situated in Kentucky of the value of many thousands of dollars, including its office and business in the county of Harlan from which a monthly income of about \$10,000.00 was realized. It was further averred that the American company was indebted to the Adams company on account of dividends due on the stock it transferred to the Adams company in a sum in excess of the amount of the judgment.

On motion of the Adams company the summons issued against it and which was executed on the agent for the

American company at Harlan, Kentucky, was quashed upon the ground that he was not at the time of the service of the summons the agent of the Adams company and no appeal is prosecuted from this order.

A general demurrer to the petition filed by the American company was also overruled and thereupon it filed its answer, in which, after denying in a general way that it was organized for the purpose of taking over the property and business of the Adams company and other express companies and also that the Adams company had transferred to it all of its property of every kind, character and description, admitted that "in good faith without fraud and for a valuable consideration the Adams company had transferred and sold its property in the state of Kentucky to the American company."

It further denied that it was indebted to the Adams company in a sum in excess of the judgments as dividends on the stock delivered by it to the Adams company or in any sum on account of or growing out of any other transaction or that it held any property or choses in action or evidences of debt in which the Adams company or its stockholders had any interest.

The affirmative matter in this answer was by agreement denied of record, and so the petition and answer constitute the only pleadings in the case.

Thereafter the depositions of Clark and Degnon, the only witnesses who testified in the case, were taken. Clark, who was an officer of the American company, testified that: On July 1, 1918, the American company purchased from the Adams company and other express companies all of their tangible property used or formerly used in express transportation operations throughout the United States, including the state of Kentucky.

"Q. I believe that you may state in your own way for the information of the court a brief history leading up to the sale and transfer of the property of the Adams company in Kentucky to the American company? A. After continued negotiations at Washington, the director general of railroads advised the executives of the express companies that he would not deal with more than one express company to operate over all federal controlled lines in the United States. Therefore, the old express companies were estopped from the right to carry on the express transportation business beyond June 30, 1918. Thereupon a new corporation was organized by the name

of the American Railway Express Company which was successful in concluding a contract with the United States Railroad Administration for the operation of the express service over federal controlled lines throughout the United States, such contract to become operative on July 1, 1918.

"The old express companies having no use for the tangible property used by them in the express transportation business and the new company having great need for this identical property, which in many respects is peculiar to the express companies, the American Railway Express Company contracted for the purchase of this tangible property used in express transportation over all the lines formerly operated by the old express companies, and this purchase and transfer of this tangible property was effected at midnight, June 30, 1918, for a valuable consideration on the part of the American Railway Express Company, thereby enabling it to continue the express transportation business without interruption.

"Q. I will ask you to state whether or not the Adams Express Company as a corporation, or rather a joint stock company, is or not still in existence with executive officers? A. The Adams Express Company is still in existence as a separate entity, with executive offices and officers in New York city. Q. Is there or not any contract in existence between the Adams Express Company and the American Railway by the terms of which the American Railway Express Company has agreed, assumed, contracted or undertaken to pay the liabilities, debts and judgments of the Adams Express Company? A. There is not and has not been such a contract. Q. On July 1, 1918, or about that date, did the American Railway Express Company own any property or have any assets of its own before the property of the other express companies was transferred to it? A. It had not.

"Q. What other express companies besides the Adams transferred their property to the American Railway Express Company? A. The Adams Express Company, the American Express Company, the Southern Express Company, Wells Fargo & Company, Great Northern Express Company, Northern Express Company and Western Express Company sold their tangible property used in the express operations to the American Railway Express Company. Q. What was the whole consideration for this property purchased from these various express companies by the American Railway Express Company?

A. Approximately \$33,000,000.00. Q. And what was the invoiced or agreed price of the property of the Adams Express Company turned over to the American Railway Express Company? A. The depreciated book value of each individual piece of property on July 1, 1918. Q. And what did it amount to in dollars? A. Why, in round numbers \$8,000,000.

"Q. I believe you have stated that the Adams Express Company bought some stock and paid cash for it from the American Railway Express Company. How much of the stock did the Adams buy and pay cash for? A. In round numbers between three-quarters of a million and one million dollars. Q. What did the American Railway Express Company do with the three-quarters of a million dollars which you say the Adams stockholders paid for stock in the American Railway Express Company? A. The cash subscription which was made to the American Railway Express Company for capital stock was used as a working fund with which to carry on its business, purchase supplies and generally to maintain its property. Q. Can you reasonably find out the value of the Adams Express Company's property that was turned over in Kentucky to the American Railway Express Company? A. No, I can not. It was all bulk.

"Q. To whom was the eight million dollars or more stock of the American Railway Express Company, which represented the value of the property of the Adams Express Company, turned over? A. To the Adams Express Company. Q. Was it turned over to the individual stockholders of the Adams Express Company or to the Adams Express Company as a joint stock company? A. To the Adams Express Company as a joint stock company."

Thomas H. Degnon, an officer of the Adams company testified as follows: Q. Please state whether or not you know whether the Adams Express Company ceased to do an express business on July 1, 1918? A. It did cease. Q. Is the Adams Express Company still in existence? A. Yes. Q. Please state whether or not, if you know, the Adams Express Company at the time of the transfer of the property used in the express business in the United States to the American Railway Express Company transferred its entire assets, tangible and intangible, of every description to the American Railway Express Company? A. It did not. Q. Was there any assets reserved by it

at the time of this transfer? A. There were. Q. Has the Adams Express Company in your estimation still assets sufficient to meet its outstanding liabilities? A. I believe it has. Q. Has it any tangible property to your knowledge? A. It has. Q. Has it any real estate to your knowledge of which it is the owner? A. Yes. Q. Did the Adams Express Company on July 1, 1918, retain any property of any kind in Kentucky that it owned at that date? A. It did not. Q. Has it now any property of any kind in Kentucky? A. It has none to my knowledge.

“Q. This suit is to force the collection of judgments rendered by the Harlan circuit court, Harlan, Kentucky, against the Adams Express Company, amounting to \$4,110.10, including costs. Has the Adams Express Company thought anything about paying these judgments or does it not intend to pay them unless it is forced to do so? A. I don't know anything about it. Q. About what value of property did the Adams own in Kentucky prior to July 1st, and up to that date—1918? A. I have no knowledge or, rather, recollection. Q. It did have a business in Kentucky and had property in Kentucky? A. It did. Q. What kind of property did it own in Kentucky? A. Principally horses, wagons, equipments of various kinds, and, I believe, some real estate. Q. How was that real estate transferred—by deed or otherwise? A. By deed. Q. What did the Adams Express Company receive for this property in Kentucky which it transferred to the American Railway Express Company? A. Shares of stock of the American Railway Express Company, either received or to be received. Q. Were the stockholders of the Adams Express numerous—many of them or only a few? A. Approximately three thousand. Q. Is the Adams Express Company engaged in any kind of actual business now? A. No. Q. For what purpose does it still retain its organization as a joint stock company? A. It still has assets undisposed of and also obligations to be settled. Q. It is retaining its organization for the purpose of winding up its affairs only, is that what I understand you to say? A. That is all it has been doing up to this time.

“Q. Do you know what understanding, either in writing or otherwise, there existed between the American Railway Express Company, after July 1, or on July 1, 1918, for the payment of the outstanding obligations of the Adams Express Company at that date? A. There

was an understanding between them. Q. If you know, state what that understanding was in that regard? A. The understanding defined that the American Railway Express Company would undertake to settle outstanding obligations of the Adams Express Company solely for Adams Express Company's account without the assumption of any liability on the part of the American Railway Express Company, the Adams Express Company keeping the American Railway Express Company in funds sufficient to do so.

"Q. Do you know the amount of cash for the purchase of the stock of the American Railway Express Company paid by the Adams Express Company? A. Nine hundred thousand and some odd dollars. Q. Did the Adams Express Company receive from the American Railway Express Company, any cash or property consideration for any of its tangible property which the Adams turned over to the American Railway Express Company? A. Not to my knowledge. Q. The only thing that the Adams company got from the American was stock? A. That is all. Q. State whether or not in your judgment the Adams Express Company in Kentucky owned and turned over to the American Railway Express Company tangible property of the value of over \$5,000? A. I believe so. Q. Was this sale and transfer of this property in Kentucky by the Adams Express Company made with the intention to defraud any creditors of the Adams Express Company? A. I do not believe so. Q. Approximately to the best of your judgment what is the value of the real and tangible property now owned by the Adams Express Company which it did not sell and transfer to the American Railway Express Company? A. According to the recent compilation by accountants, the company had property of value in round figures \$2,700,000 in excess of liabilities which it did not sell or transfer to the American Railway Express Company. Q. And does the Adams Express Company still own this property? A. The Adams Express Company still owns that property."

On this evidence the outstanding facts in this case may be stated in this way: (a) there was no merger or consolidation of the two companies. The American simply bought, and paid for in its stock, all of the property of every kind, character and description employed by the Adams in the express business, and took its place as an express company, the transaction being untainted

by actual fraud of any description. (b) The American did not pay to the Adams any consideration except the issue of its stock to the Adams to the amount of \$8,000,000, and this stock although delivered to the Adams company, was delivered to it, as we will assume, to be held by it as trustee for the use and benefit of its stockholders, or to be delivered by it to the stockholders in proportion to their respective rights. (c) Before the sale, the Adams had ample tangible property, including real estate, in this state out of which the judgment could have been satisfied, and after the sale it had in this state no property of any kind or character that could be subjected to the satisfaction of the judgment; nor were any of its stockholders residents of this state. (d) The Adams had in New York or some other state after the sale assets sufficient in value to satisfy the judgment, but whether these assets could be subjected to its payment is not certain, nor is it material whether this could or not be done. (e) Immediately upon the sale, the Adams ceased to do business as an express company, leaving no agent in the state for the service of process but retained its corporate identity merely for the purpose of winding up its affairs. (f) The sale and transfer simply had the effect of putting the American company in consideration of its stock in the possession of all the property used by the Adams and other express companies in the conduct of their business and it continued to carry on the express business just as the selling companies had carried it on before the sale. We may also here state that under our constitution and statutes the Adams although a joint stock company organized under the laws of New York is to be treated in this state as a corporation. Whether its stockholders are personally liable for its debts, as in the case of a partnership, we are not able to say as we are not advised concerning the statutes of New York or the articles of association under which it was organized. And so, under these circumstances, we will treat it as a corporation.

On these facts, the precise question before us is: will a purchasing corporation that has paid the full purchase price to the selling corporation by the issue of its stock to it be responsible in law to the extent of the value of the property received, for the debts or liabilities, whether liquidated or unliquidated, or sounding in contract or tort, that were outstanding against the selling corporation at the time of the sale, when the effect of the sale is to leave the selling corporation without any property in the

state in which the liability accrued to satisfy it, although except for the sale it would have had ample property in the state, that could have been subjected to the payment of the liability, and may have property in some other state that could be subjected to the payment of the liability?

Questions concerning the responsibility of the purchasing corporation for the debts and liabilities of the selling corporation have come before the courts of the country in many cases, and it is held practically without dissent that although the purchasing corporation does not assume the payment of any of the debts or liabilities of the selling corporation, it will yet be made responsible for them if there was no consideration for the sale, or if it was not in good faith but for the purpose of defeating the creditors of the selling corporation, or where there has been a merger or consolidation of the corporations, or where the purchasing corporation took over from the stockholders, all of the stock of the selling corporation, or where the transaction amounts to a mere reincorporation or reorganization of the selling corporation.

It is also generally agreed that when these conditions exist the purchasing corporation will be responsible for all the debts and liabilities of the selling corporations without reference to whether these debts or liabilities were created by contract or arose out of tort, or were liquidated or unliquidated.

It is equally well settled that when the sale is a *bona fide* transaction, and the selling corporation receives money to pay its debts, or property that may be subjected to the payment of its debts and liabilities equal to the fair value of the property conveyed by it, the purchasing corporation will not in the absence of a contract obligation or actual fraud of some substantial character be held responsible for the debts or liabilities of the selling corporation. Many illustrative cases fully supporting these propositions may be found in Vol. 5, Thomson on Corporations, sec. 6517; 7 R. C. L. p. 180; 10 Cyc. 307; Notes in 11 L. R. A. (N. S.) 1119; 32 L. R. A. (N. S.) 616; 47 L. R. A. (N. S.) 1058.

The facts of this case do not, however, bring it directly within these rules about which there is no disagreement in the authorities, and so the American company can only be made liable, if at all, for the payment of these judgments upon the grounds (a) that it was a mere continuation of the Adams under a new name, (b) that the

only consideration paid to the Adams was paid in the capital stock of the American company and (c) that the Adams company on account of the sale has no property or assets of any kind or character in this state that can be subjected to the payment of the judgments. These questions we will now proceed to consider.

In Camden Interstate Railway Co. v. Lee, 27 Ky. L. R. 75, the facts were these: Lee, in a suit to recover damages for personal injuries, obtained in February, 1901, a judgment against the Ashland & Catlettsburg Street Railway Co., upon which an execution was issued and returned "no property found." Rose Hoffman also had a judgment, in a damage suit in February, 1901, against this company. While these suits were pending, J. M. Camden purchased the stock of the street railway company under an arrangement with the stockholders by which they agreed to take stock in the Camden Interstate Railway Company in exchange for the stock they held in the street railway company and thereafter a deed was made by the street railway company to the Camden Interstate Railway Company, conveying to it all of its property. As a result of this, Lee and Hoffman were unable to obtain satisfaction of their judgments against the street railway company and thereupon sought to make the Camden Interstate Railway Company liable for the judgments. In the sale the Camden company did not assume the payment of any of the debts or liabilities of the street railway company. In holding the Camden company liable, the court said:

"The sum of the transaction was that Camden either owned in his own right all the stock of the street railway company by way of purchase, or controlled it under contracts by which the stockholders agreed to take stock in the new company for the stock which they held in the old, and while he thus controlled all the stock in the street railway company, he caused that company to deed all of its property and franchises to the Camden Interstate Railway Company, and thus the stockholders in the street railway company became stockholders in the interstate company. In this way the stockholders in the street railway company put all of their property and franchises in the hands of the interstate railway company, and became stockholders in that company in lieu of the street railway company. By this means, the interstate railway company swallowed up or absorbed the street railway company."

In *Harbison-Walker Refractories Co. v. McFarland's Admr.*, 156 Ky. 44, it appears that McFarland's administrator obtained a judgment against a corporation styled *Harbison & Walker Company*, that was solvent when the liability that resulted in the judgment accrued. After the accrual of the liability the owners of the stock of this company incorporated a new company, and thereafter the stockholders in both of these companies incorporated the *Harbison-Walker Refractories Company* for the purpose of taking over the property of the other two corporations and doing a like business. Pursuant to this arrangement the *Harbison & Walker Company* transferred all of its property to the new *Harbison & Walker*, and this corporation in turn transferred all of its property to the refractories company. These several transfers were accomplished merely by the purchasing companies taking over the assets of the selling companies, and issuing stock of the buying companies to the stockholders of the selling companies in lieu of their stock. After this, the administrator of McFarland brought suit against the refractories company to compel it to pay the judgment he had obtained against the *Harbison-Walker company*; and, in holding it liable for this judgment, the court said:

"The '*Harbison & Walker Company, Southern Department*,' as well as the *Portsmouth Harbison-Walker Company*, were, in reality, merged into the greater corporation, the refractories company, and the method of accomplishing that end can not change the rights of creditors, since it resulted in a transfer of all the assets of the first-named company to the refractories company, without leaving with the selling company the purchase price of the assets so sold. In the case at bar the refractories company took over all the assets of the '*Harbison & Walker Company, Southern Department*,' which was the original debtor, leaving it a mere shell, and without leaving with it any money or property whatever as a consideration for the sale of its assets. There was no liquidation of the '*Harbison & Walker Company, Southern Department*,' by selling its assets and paying its debts; on the contrary, there was a transfer of all of its property to the refractories company without any attempt to pay appellee's debt. A subsidiary corporation can not thus escape the payment of its liabilities. It is true these sales and transfers were all made by deeds of conveyance, and that the corporation had the right to sell its assets in that way, if it chose so to do; but the decision of this case

depends upon the broad equitable principle that where one corporation takes over the assets of another corporation, without paying to it any consideration therefor, as is the fact in this case, the absorbing corporation takes the assets of the absorbed corporation *cum onere*."

In Justice's *Admr. v. Catlettsburg Timber Company*, 168 Ky. 665, a creditor of the Catlettsburg Timber Company, sought to hold liable the Dawkins company that purchased the assets and property of the Catlettsburg company, paying therefor a fair and valuable consideration in money. In holding that the purchasing corporation was not liable for the debts of the selling corporation the court said:

"The law is well settled that where one corporation voluntarily conveys all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, who may follow the corporation's assets, or the proceeds thereof, into the hands of whomsoever they can trace them, and subject them to the payment of the corporation's debts, except as against a *bona fide* purchaser for value. The rule does not operate, however, to disturb sales made in good faith, and for value, or in satisfaction of valid liens." To the same effect are *Martin v. Sulfrage*, 159 Ky. 363; *Carter Coal Co. v. Clouse*, 163 Ky. 337; *Kentucky Distilleries and Warehouse Company v. Webb's Executor*, 181 Ky. 90; *Louisville and Nashville Railroad Co. v. Biddell*, 112 Ky. 494.

The case of *Chesapeake, O. & S. W. Railroad Co. v. Griest* 85 Ky. 619, apparently laid down principles somewhat at variance with these later cases, but what was said in the Griest case was not approved or followed in any of them.

In *Jennings, Neff & Co. v. Ice Co.*, 128 Tenn. 231, 47 L. R. A. (N. S.) 1058, it appears that the Crystal Ice Company, a Georgia corporation, transferred all of its property to the Atlantic Ice & Coal Company, a Virginia corporation, and the Crystal Ice Company ceased to do business but retained its corporate entity for the purpose of winding up its affairs. Prior to this sale, Jennings, Neff & Co., had brought suit against the Crystal Ice Company, and this suit was pending at the time of sale. After the sale, it obtained judgment against the Crystal company, upon which execution issued and was returned "no property found."

In the transaction, the Atlantic company assumed the payment of certain debts of the Crystal company, but not the debt of Jennings, Neff & Company. Aside from this, the only consideration received by the Crystal company for its tangible property in Tennessee, which was valued at about \$300,000.00, was stock and bonds of the Atlantic company, which were distributed to the stockholders of the Crystal company. In a suit by Jennings, Neff & Company to make the Atlantic company liable for its judgment against the Crystal company, the court, after stating the familiar doctrine that corporate assets are a trust fund for the payment of the debts of the corporation, a principle that has been time and again announced by this court, said:

"It follows that when this purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities which it had substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to the diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

"Creditors of the old corporation can not be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical, and creditors should not be forced to surrender their claim against available visible assets, and transfer such claim to new securities. Their remedy can not thus be hindered and impaired for the benefit of stockholders.

"Furthermore, these were securities of a foreign corporation, and were distributed among non-residents of the state, and we are unwilling to approve any device by which tangible property of a corporation located here and subject to the debts of that corporation can be withdrawn from the reach of creditors and distributed among non-resident stockholders. Corporate creditors may not be thus deprived of available security for their claim and forced to resort to difficult and inconvenient litigation in foreign states."

In *Grenell v. Detroit Gas Co.*, 112 Mich. 70, a judgment creditor of the Michigan Gas Company sought to make the Detroit Gas Company, the purchaser of the Michigan Gas Company, liable for a judgment against the selling company. In that case the Detroit Gas Company was organized for the purpose of taking over the business of the Michigan Gas Company, and pursuant to this arrangement it purchased all of the property and assets of the Michigan Gas Company and paid for the same by its shares of stock. The court said:

"If this transaction be viewed in the light that the defendant appears to desire it to be, viz., that these corporations are separate entities, and that the Detroit Gas Company purchased the property of the Michigan Gas Company, yet the bill shows that such purchase included all of the property of the vendor. It must have known, or, if not, it was its duty to understand, that nothing was reserved to pay outstanding indebtedness, if there were any. It paid nothing to its vendor for this plant, but dealt with its stockholders, paying to them, in its own capital stock, the price of its purchase; thus, in effect, closing out the corporate business, and dividing its assets among its stockholders. Under such circumstances, we think a legitimate inference is that the purchase was made subject to the application of so much of the property as might be necessary to the payment of the debts of the Michigan Gas Company, if not with the understanding that all debts should be paid by the purchaser. Again, a corporation can not sell all of its property, and take in payment stock in a new corporation, under an arrangement that has the effect of distributing the assets of the vendor among its stockholders, to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund.

"It is said that there is nothing to show an intention to defeat the creditors of the Michigan Gas Company, as this was not a liquidated claim at the time this transfer was made. Under the arrangement, the promoters and stockholders of the Detroit Gas Company knew that it was getting all of the property of the Michigan Gas Company, without provision for its debts, if there were any. It was bound to know that this property was charged with such debts, and ought not to be distributed among the

stockholders to the exclusion of creditors. It was a party, then, to a diversion of the trust fund, and, having in its possession such fund, holds it subject to the payment of debts. It can not be called a *bona fide* purchaser of the property, as against existing creditors."

Another instructive case is *Hibernia Insurance Company v. St. Louis and New Orleans Transportation Company*, 13 Fed. Rep. 516; in that case it appears that the Baggage Transportation Company sold all of its property to the St. Louis and New Orleans Transportation Company in consideration of stock in the latter company and the payment of certain of its debts. The stockholders in the two companies were substantially identical. The suit was to require the purchasing corporation to pay a debt due by the selling corporation, and the court said, "The fair inference from the transaction is that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. Probably no officers of the old company have since been elected, and it is to be presumed that none will be. This being so, it is at least doubtful whether service of process could be obtained so as to procure a judgment at law against the old company. And if a judgment were obtained, it could not be collected out of any assets in the possession of the old company because it had turned all its assets over to the new company. It has received, it is true, paid-up stock in the new company, but that has doubtless been disposed of; or, if it has not been, it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market.

"A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may

not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process at law. At all events, equity can not permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.

“Here was a corporation engaged in a profitable business, and owning and possessing property valued at \$92,000.00 exclusive of its franchise. It owed debts confessedly amounting to more or less than the value of its property. It ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stockholders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities. The fact here, however, appears to be that the owners of the two corporations are substantially identical, and hence there is a still stronger case in equity.”

Another very pertinent case is *Altoona v. Richardson*, 81 Kan. 717. In that case the Richardson Gas and Oil Company, a corporation, at a time when it was indebted to the city of Altoona transferred all its property to the Altoona Portland Cement Company in consideration of \$600,000 of the common stock of the latter company which continued the same business the Richardson company had been engaged in. Thereafter the city sued and obtained judgment against both companies for its indebtedness.

There was no serious question as to the liability of the Richardson company, but the Altoona company contended that it occupied the attitude of an ordinary purchaser of property and not having contracted to pay the indebtedness of the Richardson company it was under no obligation to do so; on the other hand the city insisted that the transaction between the two corporations was a virtual if not a technical consolidation—that the new company was a successor of the old and liable for its debts.

In considering the case and holding the purchasing corporation liable the court said, "In the present case it was not positively and directly proved that the old company distributed among its stockholders the stock in the new company which it received in consideration of the transfer of its property, but that is inferable from the evidence." And further said, "We think it consistent with the weight of authority and in accordance with sound reason to hold that the equitable right of the creditor to look for payment to the property of a debtor corporation is superior to any title that can be acquired through such a transaction as that here disclosed. We affirm the judgment upon the ground that where a corporation becomes practically extinct, transferring all its assets to another and receiving in return stock in the other corporation, which succeeds to its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one. Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

In the editorial note to *Luedecke v. De Moines Cabinet Company*, 32 L. R. A. (N. S.) p. 617, it is said, that, "the transfer of one corporation to another may amount to a merger in fact although the corporate existence of the transferer corporation continues. In such case equity looks past the form and at the real effect of the transaction and by an application of the trust-fund doctrine holds the transferer liable to the extent of the assets received as in such case it is not a *bona fide* purchaser for value."

In *Chicago Railroad Company v. Taylor*, 183 Ind. 240, the court said: "Where the property is taken without compensation to the original company other than the issuance of stock to it in the new organization the latter should be charged with such unpaid claims as exist against the property taken, at least in an amount equal to the value of such property."

Many other cases announcing principles similar to those set forth in the ones quoted from might be referred to but those noticed are amply sufficient for the purposes of this case and give abundant support to the conclusion we have reached that the American company should be held liable for the claim sued on.

It is true that in the cases referred to it appeared that the purchasing corporation had bought all the assets and

property of the selling corporation, while in this case it appears that the selling corporation has some property in another state, but we do not regard this circumstance as sufficient to defeat the wholesome principle running through these cases that the rights of creditors are superior to the rights of stockholders and a corporation will not be allowed to defeat its just obligations by sale or transfer of its property for no other consideration than stocks and bonds in the purchasing corporation. We have merely extended this wholesome principle for the better protection of creditors and this without prejudice to the rights of selling or purchasing corporations that desire to do what is right by the creditors of the selling corporation.

A careful consideration of the facts in all these cases and the conclusions of the courts make it clear that the circumstance that was ultimately seized hold of to make the purchasing corporation liable, was that the selling one was paid for its property in the stock of the purchasing corporation, and the property of the selling corporation to which the creditors might look with certainty for the payment of their debts was turned over to the purchasing corporation; and cases involving questions like the one we have, disclose the further fact, that when one corporation sells its property and business to another, it is usually the case, that the selling corporation takes its pay in the stock of the purchasing concern.

But the courts looking through the various forms invented to impart not only validity to the transaction but to save the purchasing corporation from liability for the debts of the selling one, have in almost every case in which the selling corporation received nothing more than stock, held the purchasing corporation liable for the debts of the selling corporation; when, however, money or property of fair value was delivered as the purchase price, the purchasing corporation in the absence of fraud or contract obligation was relieved from liability.

All the cases also hold that where there is a merger, or consolidation or reincorporation or reorganization and a continuance of the business under a new name the corporation taking over the assets and property of the corporation extinguished for all practical purposes will be liable for its debts, and as before said, in virtually all this class of cases, the corporation that went out of business was paid for its property in stock of the new corporation.

Keeping these rulings in mind it is difficult to find any substantial difference between the methods of absorption often employed, as in the case of a merger or reincorporation or reorganization, and a straight out sale like the one here in question when the selling corporation gets nothing but stock in the purchasing one.

It is true there is no direct evidence that the stockholders of the Adams received or will receive in exchange for their stock, the stock of the American that was delivered as shown by the evidence to the Adams, but it is fair to, and we will, assume that this stock was turned over to the Adams for distribution to its stockholders as their rights may appear because they owned the whole beneficial interest in the property that was given up for this stock and the clear inference is that the Adams as a corporate entity holds this stock in trust for its shareholders or to be delivered to them.

Neither should it be overlooked that the record shows that the American was organized for the sole purpose of taking over the property and business of and pursuant to this arrangement did take over the business and all the property employed therein of the Adams and the other express companies and continued under a new name and a new organization the precise business they were engaged in, nor is it open to doubt that the great bulk of its stock is owned by the stockholders in these old companies although there may be many new shareholders. Indeed it would not be wide of the mark to say that the American under a new name and new organization was merely a continuation of all the old companies, as this was in effect the result of the sale and transfer of the business and property of the old ones to the new.

But it is said that the Adams is yet a corporation and owns property more than sufficient to satisfy its debts. It is true that it yet has a corporate existence but no suit can be maintained against it in this state and all of its property that had a situs in this state has been taken from it. So far as Kentucky creditors are concerned it is nothing more than a mere shell and a very empty one at that. If it owns tangible property of value none of it is in this state and more than likely it has none outside the state that can be seized and subjected by pursuing creditors. At any rate it is plain that the creditor in this state in order to make his debt, would be required to go to the state of New York, and find there, if he could,

property to satisfy his debt, and then resort to the courts of New York to try and collect it. We say this because the Adams company so far as this record shows has no disposition to pay this debt and we may assume will resort to every possible means to defeat its collection.

Of course, a corporation may sell its property and all of it of every kind, just as any natural person may, and when it does this and receives its fair value in money to pay its debts, or property that the creditor can subject to the payment of its debts, a purchaser in the absence of a contract obligation can not be held for the debts and liabilities of the selling corporation.

But when the selling corporation disposes of all its property and takes for it shares of stock in the purchasing corporation and both the buyer and seller refuse to pay the debts of the seller it is perfectly plain that the rights of creditors of the seller have been prejudiced by the sale, as to them the sale is constructively fraudulent and for this reason courts will hold the purchasing corporation liable for the debts of the selling one.

The substantial difference between a corporation and an individual, so far as the sale of all its or his property is concerned, is that the corporation is a creature of the law. There is no personal liability. All it has for the payment of its debts is its property and assets, and the law, for the protection of creditors, has impressed this property with a trust character for the payment of the debts and said that the corporation holds it for the benefit of its creditors and when it parts with this property, getting in return nothing the creditor can subject, the law will follow the property into the hands of the taker and make it liable to the extent of the value of the property received.

When the American bought the Adams, that company had for years been engaged in an extensive business throughout the United States and the American must have known that it had liabilities, but no provision whatever was made for their payment, and it now says to the creditors of the Adams in Kentucky, if you want your money go to the state of New York and try to get it. We will not give our sanction to a scheme like this, and the conclusion we have reached is supported by abundant authority.

Under all the facts and circumstances of this case, the American might well be held liable on the theory that it was merely a continuance of the old companies under a new name. We prefer, however, to put our decision upon

the distinct ground that when one corporation, foreign or domestic, takes over the business and property of another that had in this state sufficient tangible property subject to execution to satisfy all its debts in this state, and pays for the property so taken over in nothing more than its stock, it becomes liable to state creditors of the selling corporation to the extent of the value of the property it has received in the sale, although the selling corporation may retain its corporate entity for the purpose of winding up its affairs, and have in some other state, property that might be subjected to the payment of its debts, and this upon the ground that such a sale is constructively fraudulent.

This rule is not an unreasonable or harsh one nor will it in any manner interfere with the sale by a corporation of its property and business or subject to loss the purchasing corporation if it uses reasonable care, as it may easily do, to protect itself from the liabilities of the selling corporation. All it need do is to make arrangements in the articles of sale for the payment of the debts of the selling corporation to the extent of the value of its property conveyed or pay for this property in money or other things of value that the creditors of the selling corporation may look to for the payment of their debts.

In view of the multitude of various enterprises in which corporations are engaged and the fact that creditors can only look to the property of the corporation for the payment of their debts it is nothing more than just and reasonable that the corporation should not be allowed to dispose of its property and business without getting something in return to pay its debts.

In considering this case we have not thus far noticed the authorities relied on by counsel for the American company, the principal one being *McAlister v. the American Railway Express Company*, 103 S. E. Rep. 129. In that case as in this the American company took over the business and property of the Southern Express Company at the same time and for the same reason and under the same circumstances that it took over the property and business of the Adams company.

McAlister in that case sought to make the American liable for a claim he had against the Southern. The facts of the two cases are as nearly alike as the facts of two cases could well be, but the North Carolina court reached the conclusion that the American company was not liable, putting its decision upon the ground that the purchasing

company in the absence of contract obligation or fraud can not be held liable for the debts of the selling corporation when there has been no merger or consolidation and the selling corporation does not become extinct and retains sufficient property to pay its debts.

We do not, however, find ourselves willing to agree with the North Carolina court although its decision finds some support in the authorities. We are well satisfied that the great weight of modern authority as well as the right of the case supports the conclusion we have reached.

Wherefore the judgment is affirmed.

Wright, et al. v. Singleton.

(Decided December 17, 1920.)

Appeal from Trigg Circuit Court.

1. Wills—Life Estates—Intention of Testator.—It is well settled that where a life estate has expressly been created by a will, the estate devised will not be deemed enlarged by a subsequent provision of the instrument, unless the language thereof is so explicit in statement and meaning as to clearly show that such was the intention of the testator.
2. Wills—Limitation to Life Estate.—Where the devise is expressly limited to a mere life estate in the devisee named, the limitation to a life estate can not be affected by the failure of the will to devise the remainder, as in such event the estate upon the death of the life tenant will go, as in case of intestacy, to the heirs of the testator entitled to take under the statute.
3. Wills—Heir at Law—Right of—Intention of Testator.—The heir at law does not take by the act or intention of the testator. His right is independent of the will, and to deprive him of it the language of the will must plainly manifest an intention on the part of the testator that he shall not take.
4. Wills—Life Estates.—The language of a will declaring that the widow of the testator is given his entire real and personal estate: "to her and for her absolute use and benefit while she lives," and making no disposition of the estate to take effect after her death, vests in her a life estate in the property devised, which at her death will go to the testator's heirs at law.

JOHN G. MILLER and ALBERT MOORE for appellants.

SINGLETON D. HODGE for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

Wm. H. Singleton, a resident of Trigg county, died in 1919, testate, survived by his wife, the appellee, Belle G. Singleton, but no children, the only child born to them, a son, having died March 11, 1910, unmarried and childless. The will of Wm. H. Singleton, which was executed December 10, 1910, was shortly after his death duly admitted to probate by the Trigg county court. Although the appellee, Belle G. Singleton, widow of the testator was appointed by the will the executrix thereof without requirement of bond or security, she did not qualify as such executrix until a controversy arose several months after the will was probated between her and the appellants W. R. Wright and others respecting her rights as a devisee thereunder. She did, however, immediately after the death of the testator take possession of the real and personal property left by him and sell some of the personalty, the proceeds of which she yet holds. She also later sold the real estate, consisting of 120 acres of land in Trigg county, to one Wm. Robinson for \$9,000, and upon his paying her the consideration executed a deed conveying him the land; but as Robinson thereafter questioned her title to the land or right under the will to convey him a fee simple title to the same, by agreement between them the sale thereof was rescinded and the purchase money returned.

In the meantime the appellants, W. R. Wright and others, who were the cousins and only blood relatives of the testator, began to contend that appellee was given by his will only a life estate in the property therein devised, and that the remainder being undisposed of by the will, would at her death be inherited by them as his heirs at law. This situation and the appellee's desire to be advised of her rights as a devisee under the will led to the institution by her of the present action in the court below to obtain a construction of the will in question. The appellants were made defendants to the action, and being non-residents, were proceeded against by warning order and the appointment of an attorney to represent them. The petition alleged that the appellee took under the will of her husband the fee in the real and personal estate it devised; and while the relationship of appellants to the testator is admitted by the petition it is therein alleged that neither under the will nor by inheritance do or can they take any interest in the estate devised.

Appellants by answer controverted the construction of the will contended for by appellee, and alleged that the

will merely devised her an estate for life in the property, real and personal, left by the testator. The answer also alleges the precise blood relationship of each of the appellants to Wm. H. Singleton, the testator of the will, and their claim of heirship in and to the estate left by him and which, they insist, will at appellee's death go to them as his heirs at law under the statute of descent and distribution of this state. The circuit court sustained a general demurrer to the answer of appellants and adopted the construction of the will contended for by appellee, who was adjudged to be the taker of a fee simple title to the property, real and personal, it devised her, and it in addition awarded appellee a recovery against appellants of her costs expended in the action. From the judgment thus determining the rights of the parties, the latter have appealed. Whether the circuit court erred in its construction of the will is a question to be determined by the provisions of that instrument as a whole. The will is as follows:

"I, William H. Singleton, of the county of Trigg, state of Kentucky, and being of sound mind, memory and understanding do hereby make this my last will and testament, this the tenth day of December, nineteen hundred and ten, A. D.

"A. Having no bodily heirs: I, William H. Singleton, do bequeath all my lands and tenements, and all my personal property, including all household furniture, money securities for money, and all other parts of my real, personal estate and effects, whatsoever and where-soever unto my beloved wife, Belle G. Singleton, to her and for her absolute use and benefits while she lives subject only to the payment of my just debts, funeral and testamentary expenses, and the charges of proving and registering this my will.

"B. I further state and demand that Joseph Faulkner's heirs, Wallen and Lelan Faulkner and their heirs be disinherited and disbarred from any part or interest of my estate at my wife's death.

"C. I furthermore appoint my wife executrix of this my will, without bond or security to the judge of probate.

"In witness thereof I have set my hand and seal this the 10th day of December, 1910, A. D."

We know of no surer method of ascertaining the meaning of a will than that stated in the recent case of *Simpson v. Simpson*, Extrx., 189 Ky. 536.

"To arrive at the meaning of the will here presented for construction, we must endeavor to discover the intention of the testator from the instrument as a whole. If it is explicit and the meaning of its language is involved in no obscurity, rules of construction meant to elucidate, to which the courts are often compelled to resort, can not be employed. As said in *Howard v. Cole*, 124 Ky. 816, quoted with approval in the following excerpt from the opinion of the recent case of *Fowler v. Mitchell*, 170 Ky. 253: 'The real question in each case is not what did the testator mean or intend to say, but what is meant by what he said? Courts may frequently be of opinion that he did not intend to say what he did say, but they are not thereby authorized to give to the will any construction other than that which is justified by a fair interpretation of the wording and the language of the will itself.' "

Applying this rule we find little difficulty in arriving at the meaning of the will under consideration. What it devises the widow is contained in clause "A," and included all the testator's property therein specifically mentioned "unto my beloved wife, Belle G. Singleton, for her absolute use and benefit *while she lives*." Manifestly the words "for her absolute use and benefit while she lives," has exactly the same meaning as the words, "for her absolute use and benefit during her natural life," that were held in *Davidson's Adm'r v. Davidson's Adm'rx*, 149 Ky. 571, to invest the widow with only a life estate in the property devised. Substantially the same words were also held in *Howard v. Cole*, 124 Ky. 816; *Cecil v. Cecil*, 161 Ky. 419, and numerous other cases to limit the devise to a life estate. Indeed, it will be found from an examination of the authorities that this language is more frequently employed than any other to create a life estate. It is true that in many of these cases there was a devise over of a remainder in the estate, but the limitation to a life estate clearly expressed can not be affected by the failure of the will to devise the remainder, as in such event the estate will, at the death of the life tenant, go as in case of intestacy to the heirs of the testator entitled to take under the statute.

This rule will control in the instant case. As the will makes no disposition of the testator's property other than the devise of a life estate therein to his widow, the property will at her death descend to the appellees as his heirs at law. It is clear that the will gives the widow no power

to dispose, by will or otherwise, of such part of the estate as may not be consumed by her, for it contains no provision to that effect, and the absence of such power is shown by clause "B," which declares that the nephews of the widow named therein shall have no part of the estate. It is well settled that where a life estate has been once expressly created in a will, no language thereafter used in the instrument, short of plain and explicit terms, will be deemed to have enlarged that estate. *Cecil v. Cecil*, 161 Ky. 419; *Trustees, etc. v. Mize*, 181 Ky. 567; *Radford v. Fidelity, etc. Co.*, 185 Ky. 435. Another well known rule is here applicable, which is, "The heir at law never takes by the act or intention of the testator. His right is independent of the will and no intention on the part of the testator is necessary to its enjoyment. On the contrary such right can only be displaced or precluded by direct or plain intention evincing a desire on the part of the testator that he shall not take." *Augustus v. Seabolt*, 3 Met. 155; *Bartlett v. Patton*, 5 L. R. A. 523.

The mass of extraneous matter set out in the petition intended to show the circumstances supposed to indicate an intention on the part of the testator to devise the widow an absolute estate in his property, can have no place in construing this will, and it should have been stricken out as asked by appellees. Such matters can be considered only when the will is so ambiguous as to leave the intention of the testator in doubt; but when, as here appears, the intention of the testator is clearly expressed to limit the devise to the wife to an estate for life, they can have no effect.

For the reasons indicated the judgment is reversed and cause remanded for the entering of such judgment as will conform to the opinion.

Hughes v. Eison, et al.

(Decided January 11, 1921.)

Appeal from Livingston Circuit Court.

1. **Counties—Indebtedness for Road and Bridge Purposes.**—While a tax for road purposes can not be levied under section 4307, Ky. Stats., until there is an indebtedness requiring the raising of revenue for such purposes, such indebtedness is incurred within the meaning of the statute when the fiscal court enters a proper or-

der for the improvement or construction of public highways or bridges in the county.

2. Counties—Recovery of Sheriff of Money for Road Purposes.—Taxpayers can not recover of the sheriff money paid in as tax for road purposes where there is a good faith purpose evidenced by proper orders of the fiscal court to undertake the improvement or construction of public highways.
3. Counties—Recovery of Money Paid as Tax for Road Purposes.—That money raised by a tax levy for road purposes is not used on the roads in the year for which it was intended, does not entitle the taxpayers to recover the same. If the road improvement or construction is unreasonably delayed a court of equity will, upon proper application, afford relief.

C. H. WILSON and J. R. WELLS for appellants.

CHAS. FERGUSON for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

On April 6th, 1918, the voters of Livingston county had submitted to them by the fiscal court of that county the following question: "Will we vote a property tax in said county for the period of ten years at the rate of 20 cents on each one hundred dollars' worth of property in said county subject to local taxation, the same to be used and applied for the improvement and construction of public roads and bridges of this county?" The proposition carried, and very soon thereafter the fiscal court entered an order levying a tax of 20 cents on the one hundred dollars' worth of property subject to taxation in Livingston county.

The sheriff, who is appellant herein, collected the tax for 1918, and also for 1919, amounting in the aggregate for the two years to more than sixteen thousand dollars. This proceeding in equity was commenced on August 12th, 1920, in the Livingston circuit court by C. R. Eison and Mrs. Lee A. Eison and the Commonwealth of Kentucky for the use and benefit of all the tax payers of Livingston county against E. F. Hughes, sheriff of that county, to recover all the money collected by the sheriff, under and by virtue of the special 20 cent road tax voted by the people. The answer of the sheriff relied for justification of the tax upon the authority granted by section 157a of the constitution of Kentucky, and the legislation had thereunder, which is section 4307b, Kentucky Statutes, but a general demurrer to the answer was sustained by the trial court, and the sheriff failing to plead further

judgment was entered for the plaintiffs, appellees here, directing the sheriff to turn over the entire fund of \$16,263.47 to the master commissioner to be by him repaid to the taxpayers of the county, after certain costs and attorneys' fees were first paid out of it. The sheriff appeals.

The appellees, plaintiffs below, insist that an indebtedness on the part of the county at the time of the levy of the special road tax, if not at the time of the submission of the question to the voters, was a prerequisite to the right of the county to levy or collect such a tax under 157a of our constitution and section 4307b Kentucky Statutes, and it is admitted that the county of Livingston had no bonded indebtedness or other outstanding obligations, but on the contrary the county had a surplus in its road fund both before and at the time of the levy and collection of the special road tax sought to be recovered by the taxpayers. So if an existing indebtedness is a prerequisite to the right of the fiscal court to make such levy and collection, then the taxpayers are entitled to reclaim the money paid in by them, for no such indebtedness existed.

Section 157 of our constitution limits the tax rate of counties to 50 cents on the one hundred dollars' worth of taxable property of the county subject to local taxation, with the proviso that in case of necessity to enable the county to create a fund to pay the interest on and provide a sinking fund to extinguish an indebtedness existing at the time of the adoption of the present constitution such rate may be increased. It further provides that no county shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount in excess of the income and revenue of the county for that year, without the assent of two-thirds of the voters of the county voting at an election to be held for that purpose. Section 157a of our constitution is an amendment to our fundamental law, and was adopted by a vote of the people in 1909. Under it any county may be permitted to incur an indebtedness in any amount fixed by the county, not in excess of five per centum of the value of the taxable property therein, for public road purposes; provided said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for that purpose, and when any such indebtedness is incurred by any county said county

may levy, in addition to the tax rate allowed under section 157 of the constitution, an amount not exceeding 20 cents on the one hundred dollars of assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness.

If there be a conflict between the terms of sections 157 and 157a of our constitution the latter, as we have written, must prevail. *Gatton v. Fiscal Court*, 169 Ky. 426.

So reading the two sections of the constitution together the tax rate of a county for all but school purposes, shall not exceed, at any time, fifty cents on the one hundred dollars, except a county may for public road purposes, and to meet a proposed indebtedness for that purpose levy, in addition to the rate allowed by section 157, an amount not to exceed 20 cents on the one hundred dollar valuation.

The maximum rate of taxation of a county as originally fixed by sec. 157 of our constitution contained only one exception to its limitations—schools. For school purposes a greater rate than fifty cents on the one hundred dollars' valuation of the property of the county was allowable. When we amended the constitution by adding section 157a we wrote into the exception in favor of schools in section 157 thereof, the word "roads" so that section as amended should be read "The tax rate of . . . counties, for other than school and road purposes shall not at any time . . . exceed . . . fifty cents on the one hundred dollars of taxable property in the county." So read section 157a becomes, in effect, a part of 157 and there is no conflict. The amendment, sec. 157a, only enlarges and extends sec. 157. The provision in sec. 157a "any county may be permitted to incur an indebtedness in any amount fixed by the county not in excess of five per centum of the value of the taxable property therein for public road purposes in said county, provided said additional indebtedness is submitted to the voters of the county for ratification or rejection at a special election held for said purpose," harmonizes perfectly with the provisions of section 157, when read as above suggested. It will be observed that section 157a requires the vote to be taken on the amount of the indebtedness to be incurred and not on the rate of taxation to be levied, while section 4307b of the statutes enacted in pursuance thereof required both the rate of taxation and the incurring of the indebtedness to be submitted to the voters for their

approval. This does not in any way affect the validity of the statute for it does not conflict with the constitutional requirements, but only goes one step farther and requires the fiscal court to take the people into its full confidence, and let them know the maximum rate of taxation which will be fixed, and the number of years it shall run, to meet the proposed indebtedness, and is a wise provision.

In the case of *Collier v. Bourbon County Fiscal Court*, 188 Ky. 490, we held section 4307b constitutional and valid.

The question submitted to the voters of Livingston county at the special election held April 6th, 1918, embraced both the right of the county to incur the indebtedness and to lay a levy of 20 cents on the one hundred dollars' valuation for a period of ten years, thus complying with the constitutional provision and the requirements of the statutes.

By the terms of 157 of the constitution no indebtedness in excess of the income and revenue of the county for the current year is authorized or permitted. The provision is not changed by the amendment — 157a, but is now in full force and effect. It will thus be seen that the amount of the indebtedness which a county may incur in any given year is limited and in the same measure controlled by the amount of its current income and revenue. As its income increases its indebtedness may increase. The increase of the latter is dependent upon the increase of the former.

A county could not, therefore, incur an indebtedness such as that proposed by Livingston county without submitting the proposition to the voters of the county for their approval or rejection. Hence it was, therefore, impossible for the county of Livingston to have had an existing indebtedness of the nature proposed, at the time of the special election or at any time before its income and revenue had been so augmented as to allow such increase in indebtedness, otherwise a vote would not be necessary. An indebtedness otherwise incurred would, according to the plain terms of section 157 of the constitution, have been void and unenforceable by the creditors of the county, which would be in effect no indebtedness at all. Thus, those who insist that a pre-existing indebtedness is necessary to give the right to lay such tax, reason in a circle. We, therefore, conclude that the indebtedness contemplated by the constitution and statute to authorize the

levy and collection of the tax, is such as the county or its fiscal agents may in good faith propose or contemplate and not an actual existing indebtedness. This construction of the statute 4307b and its sub-sections appears well nigh irresistible. To hold that the indebtedness must be existant at the time of the submission of the question of voting a special road tax would be to render the whole amendment to the constitution and the statute a nullity, because self destructive. As there can be no indebtedness under 157 in excess of the income of the county for the current year and the income can not be increased except by a special road tax vote it necessarily follows that no actual existing indebtedness is required but only a good faith purpose to undertake and accomplish specified road and bridge construction or improvement, in order to warrant the submission of the question of whether a tax shall be levied and the levying of the tax if approved by the people. We so held in effect in the case of *Collier v. Bourbon Fiscal Court*, *supra*. For in that case the 20 cent tax levied for road purposes was divided into two funds; one of four cents to go to pay the interest on and create a sinking fund for the extinction of the bonded indebtedness of the county voted on the same day the 20 cent road tax was submitted to the people, the other 16 cents was set aside for the purpose of improving and constructing roads and bridges of that county, which was not in fact an existing indebtedness but only a good faith proposed indebtedness. It was held that the fund thus created could be held and spent by the county annually to build or improve its roads or bridges. The sixteen cents of the Bourbon county fund was in exactly the same attitude as the 20 cent road tax of Livingston county which is now before us.

It is not at all material that the fiscal court may have laid its regular levy for county purposes and set aside some of this for road purposes. The special road tax was intended to be and is supplemental of that fund.

When the fiscal court by proper order embarked on a program of road building and invoked state aid for that purpose as is prescribed by law, and designated certain roads for construction or improvement with the funds derived from the special road tax, the requisite of indebtedness was fulfilled. The funds so raised can not be appropriated to any other use than that for which they were voted, and if the fiscal court should attempt so to do, a

court of equity will grant such injunctive remedy as will prevent the diversion of the funds.

For these reasons the demurrer to the answer of the sheriff should have been overruled.

The judgment is therefore reversed for proceedings consistent with the views herein expressed.

Lacey v. Layne, et al.

(Decided January 28, 1921.)

Appeal from Todd Circuit Court.

1. Husband and Wife—Expression of Purpose to Convey—Trust Relation.—The expression of a purpose by a wife to convey at some time in the future land to her husband, is evidence of no purpose upon her part to create any trust relation, or any purpose to hold the land as security for a debt, and carries with it no legal or moral obligation.
2. Contracts—Cancellation.—The cancellation of an executed contract by a court of equity is the exercise of an extraordinary power and should not be resorted to except in a clear case.
3. Trusts—Parol Evidence.—Parol evidence of the existence of a trust in land is required to be clear, convincing and most satisfactory, and particularly will it be closely scrutinized after the death of one or more of the interested parties.
4. Trusts—Constructive Trust—Evidence.—Evidence examined and held to be insufficient to establish a constructive trust, or that the decedent held the title as security for money.
5. Deeds—Alteration—Title.—Where a deed is executed and delivered to one and is accepted by him, and he pays the cash consideration therefor and executes his notes for the deferred payments, but thereafter causes the said deed to be so altered that another is made to appear to be the grantee, and there is no re-execution or re-acknowledgment of the deed thereafter, the first grantee is not divested of title.
6. Estoppel.—Estoppel must be pleaded.

JAMES R. MALLORY for appellant.

SELDEN Y. TRIMBLE and TRIMBLE & BELL for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming in part and reversing in part.

In 1899 the appellant, E. W. Lacy, married Miss Fennie Layne. At the time they each had some personal

property of small value, but in 1902 she inherited fifteen acres of land which they thereafter occupied as a home.

Adjoining the fifteen acre tract was a tract of 137 acres owned jointly by Stuart and Yancey, Stuart a one-third undivided interest and Yancey two-thirds.

In March, 1902, the wife had in addition about six hundred dollars which she had inherited, and at that time appellant contracted with Stuart, and Stuart and wife conveyed to him their undivided one-third interest in the 137 acre tract for the consideration of one thousand dollars, appellant using his wife's money in the payment of the cash consideration of seven hundred dollars, and executing his notes to Stuart for the deferred payments. Stuart and wife executed the conveyance, and delivered to Lacy a conveyance therefor which he accepted; but when Lacy took the deed home and told his wife of the transaction, they concluded that the deed should have been made to her, and thereafter Lacy took the deed, before it was recorded, back to Stuart, and Stuart erased therefrom the initials "E. W." and inserted in lieu thereof wherever they appeared the name "Fennie." Thereafter the instrument was delivered to Lacy and was so placed on the record. There was no re-execution by Stuart and his wife of the deed, and the alteration therein was made by Stuart, with the knowledge and acquiescence of Lacy and his wife.

Thereafter, in 1911, Lacy contracted with Yancey for the purchase of his two-thirds interest in this land at the price of two thousand dollars, and Yancey wrote, or had written, a deed conveying it to E. W. Lacy, but upon a conference between Yancey and Lacy and wife it was agreed to convey the two-thirds interest to Mrs. Fennie Lacy, which was done.

Lacy and his wife never had any children, and she, in 1916, died intestate leaving as her only heirs at law the appellees herein, and shortly thereafter the heirs at law filed this suit asking for a partition of the two tracts of land among them after setting apart to the surviving husband his dower interest therein.

The husband answered, admitting his wife's ownership of the fifteen acre tract of land, but asserting title in himself to the 137 acre tract, and alleging, in substance, that the conveyance to his wife of the two interests in that tract were made for the sole purpose of creating a lien against said land in her favor for the sum of five hundred

dollars which he had borrowed from her to make the cash payment on the Stuart interest, and that she held the land only to secure the payment of the same; that during her life he had repaid her the five hundred dollars but that she had delayed the making of conveyance thereof to him until her death and that said deeds should be construed, therefore, as a mortgage which should be cancelled, and the 137 acre tract adjudged to be his property. He further alleges that he had paid the whole purchase price for the said tract of land, and from the time of the purchase thereof had claimed, owned and occupied the same, and that his deceased wife had throughout that period recognized the same as belonging to him.

In a separate paragraph he asks that if the court, upon final consideration, should be of opinion that he is not entitled to a conveyance for the same, then that he be adjudged a lien thereon for three thousand dollars, the purchase money alleged to have been paid by him, and that the same be enforced.

The reply put the material allegations of the answer and counterclaim in issue, and in a separate paragraph it was pleaded in the alternative that if the defendant paid any part of the said purchase money he either gave the same to his wife or he caused the conveyance to be made to his wife secretly and fraudulently for the purpose of hindering and defrauding his creditors and for the purpose of preventing them from subjecting the same to the payment of his debts.

By a rejoinder and surrejoinder the issues were completed and upon final judgment the court adjudged the property to be that of the heirs at law, subject to Lacy's dower right, and he has appealed.

As to the Yancey conveyance the only direct evidence in the record that it was made to Mrs. Lacy, to be held by her in trust for him or as security for a debt and to be later reconveyed to him, is that of the appellant himself, and Yancey, and it is apparently conceded, as it must be, that this involves a transaction between Lacey and his deceased wife and his testimony is therefore not competent.

Yancey says that he first prepared the deed to E. W. Lacy and went to their home where he was informed that they wanted it to Fennie Lacy, and that E. W. Lacy said he had paid Fennie her money and he wanted this deed fixed just like the other so that later on she could make him a deed to the whole of it, and that in the same conver-

sation Mrs. Lacy said, in substance, the same thing; that is, "that later on she wanted to deed the whole thing to Lacy; that he had paid her her money and that she had put it on that house they were living in."

Giving to this language its broadest meaning and fullest import, nothing can be found in it which creates, or which may be fairly said to have had the purpose to create, any trust relation between her and her husband. Nor does it evidence any purpose to hold the same as security for a debt. At best it only was the expression of a purpose upon her part in the future to convey this land to her husband, and does not carry with it any legal or moral obligation resting upon her or that she thought at the time rested upon her.

The expression of an intention to do in the future some particular thing with one's property creates no obligation to do that thing. It has been many times written that the cancellation of an executed contract by a court of equity is the exercise of a most extraordinary power and that it should not be resorted to except in a clear case. It is likewise the invariable rule in this state and elsewhere that where the existence of an alleged trust must depend upon parol evidence, the chancellor will require clear, convincing and most satisfactory evidence, and particularly will the evidence be closely scrutinized after the death of one or more of the parties directly interested.

It may further be remarked that at the time of this Yancey transaction there was no relation of debtor and creditor between Mr. and Mrs. Lacy and therefore there then existed no reason consistent with the appellant's theory of this case why the title to that interest should have been taken to her to hold as security for a debt. The claim that the title was taken to her so that she might thereafter convey the whole tract to him at one time is not convincing; according to the appellant's theory he had at that time repaid her the money which she had advanced to pay on the Stuart interest, and if his claim as now asserted was correct, it would have been a much simpler way to have adjusted the whole matter by having the Yancey interest conveyed to him and taking her conveyance for the Stuart interest.

The evidence as a whole falls far short of establishing the trust asserted by the appellant. Nor is it satisfactory that he paid the whole consideration. There was no way to raise this money except from the proceeds of her property, which he managed and controlled for her.

The Stuart deed, however, was first executed and delivered to E. W. Lacy; he accepted the same; he paid the first payment and executed his notes for the others; thereafter that deed was so altered that the grantee therein was made to appear to be Fennie Lacy. Was E. W. Lacy by such alteration divested of title, although he himself was a party to the whole transaction? Under our law one may be divested of title to real estate only by his voluntary act done in the manner prescribed by law or by the judgment of a court of competent jurisdiction. In this case Stuart conveyed his one-third interest to E. W. Lacy, accepted from him the cash payment and his notes for the deferred payments, and thereafter, at the instance of both Lacy and Lacy's wife, altered the deed after it had been executed and delivered so as to make her appear to be the grantee. Under these circumstances the title still remains in him. *Austin v. Moore*, 188 Ky. 832; *Rittenhouse v. Clark*, 110 Ky. 147; *Mize v. Day*, 153 Ky. 739; *Devlin on Deeds*, Vol. 1, sec. 300; *Tiedeman on Real Property*, sec. 812.

It may be said, however, that in as much as Lacy was a party to this transaction and actually had the deed altered so as to make his wife appear to be the grantee therein, he would be estopped to deny that she was; but it is unnecessary to discuss this question in this case for the reason that there is no plea of estoppel and estoppel must be pleaded. *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171; *Brackett v. Modern Brotherhood of America*, 154 Ky. 340.

It results therefore that the judgment of the lower court was erroneous in not adjudging E. W. Lacy to be the owner of the Stuart one-third, undivided interest; but in all other respects it was proper.

The judgment is reversed, with directions to enter a judgment in conformity with the views herein expressed.

White Grocery Company, et al. v. Moore, et al.

Moore, et al. v. Snyder, et al.

(Decided March 1, 1921.)

Appeals from Whitley Circuit Court.

1. **Appeal and Error—Jurisdiction of Court of Appeals.**—The jurisdiction of the Court of Appeals is limited to cases where the

amount in controversy, exclusive of interest and costs, is as much as \$200, unless the title to land, or the right to an easement therein, or the right to enforce a statutory lien thereon, or the construction or validity of a statute, or a section of the Constitution, is directly involved.

2. Appeal and Error—Jurisdiction—Amount in Controversy.—Where the claim of one plaintiff was \$168.95, and another plaintiff, \$107.62, the two claims, though purporting to be secured by the same mortgage, are separate and distinct and can not be added together for the purpose of conferring jurisdiction.
3. Appeal and Error—Statutory Lien—Jurisdiction.—Where a mortgage lien was assumed either by the mortgagors or their grantees in a subsequent deed, the lien was a mere contract lien, and not a statutory lien giving jurisdiction, where the amount involved was less than \$200.00 exclusive of interest and costs.
4. Deeds—Action for Purchase Money—Right to Judgment Where Grantee Makes no Defense.—Where grantors allege that the grantee agreed to assume the payment of an outstanding mortgage as a part of the consideration for the deed, and the grantee made no defense, grantors were entitled to a personal judgment against him.
5. Reformation of Instruments—Deeds—Mistake—Bona Fide Purchasers.—A deed will not be reformed on the ground of mistake as against a subsequent purchaser for value without notice.
6. Husband and Wife—Wife's Separate Estate—Mortgage—Consent of Husband.—The mortgage of her land by a married woman is void unless her husband unites in the mortgage.
7. Bills and Notes—Bona Fide Purchaser—Purchase Money Lien Note—Right of Purchaser to Lien on Property.—A subsequent purchaser for value of a lien note given for part payment of land, and reciting that the payee assumed the payment of all mortgages against the property, was entitled to a first lien on the property, as well as a personal judgment against his assignor and the makers of the note, where the only outstanding mortgage was void, and the mortgagees had been denied a recovery, and the only other alleged lien against the property was based on a mistake in a prior deed of which he had no notice.

J. B. and B. B. SNYDER for White Grocery Co., etc.

H. C. GILLIS for E. and C. Moore.

R. L. POPE for J. E. and S. E. Peace.

W. R. HENRY for Garrett Snyder.

OPINION OF THE COURT BY JUDGE CLAY—Denying appeals and affirming as to White Grocery Company and Harden Creekmore Company, and granting appeals and reversing as to Elizabeth Moore, Charles M. Moore and James Bennett.

On March 23, 1916, Elizabeth Moore, wife of Charles M. Moore, executed and delivered to the White Grocery Company and Harden Creekmore Company a mortgage on certain property in Whitley county to secure two notes, one to the White Grocery Company for \$168.95, and the other to the Harden Creekmore Company for \$107.62, each bearing the same date as the mortgage and payable six months from date. Her husband did not unite in the mortgage.

On September 2, 1916, Elizabeth Moore and husband sold and conveyed the same property to Garrett Snyder for the recited consideration of \$600.00 cash in hand paid. The deed contained the following provision: "Party of the first part assumes a mortgage upon this property in favor of the White Grocery Company for \$168.95, and also Harden Creekmore Company for \$107.62."

On December 27, 1916, Garrett Snyder and wife sold the property to J. E. Peace and S. E. Peace for \$400.00 cash and a note for \$350.00 payable twelve months from date and secured by a lien on the property. On the face of the note was the following: "Garrett Snyder agrees to assume and pay all mortgages against and of record against said property, and render the said Peace harmless on that account."

Thereafter Garrett Snyder transferred the note of \$350.00 to James Bennett in payment for a house and lot at High Cliff, Tennessee.

On March 24, 1917, the White Grocery Company and Harden Creekmore Company brought suit against Elizabeth Moore, Charles M. Moore, her husband, and L. F. Peace to enforce their mortgage lien on the property, the petition alleging that by deed of September 2, 1916, Elizabeth Moore and husband recognized and assumed the mortgage upon the property, and that Charles M. Moore, by acknowledgment of said deed ratified the mortgage theretofore entered into by his wife, and thereby created a lien upon the property in favor of plaintiffs for the amount of their indebtedness. It further alleged that L. F. Peace had retained in his hands enough of the purchase price to pay the indebtedness. A warning order was issued against Elizabeth Moore and her husband. On September 22, 1917, the deposition of B. B. Snyder was taken. Snyder testified that he was present when the notes and mortgage were executed, that the agreement was that Snyder, the purchaser, should assume the

payment of the mortgage. He was also present when the deed from Garrett Snyder and wife to the Peaces was executed, and explained to L. F. Peace that there was a mortgage on the property, and the note was drawn in order to protect the Peaces against the mortgage. On October 13, 1917, L. F. Peace answered and stated that he purchased the land described in the petition for J. E. Peace and S. E. Peace. At the time of the purchase he knew of the mortgage and two debts. He refused to pay the full amount of the purchase price but executed the note with the payment thereof conditioned upon the discharge of the mortgage and all other indebtedness against the property. On October 13, 1917, L. F. Peace gave his deposition and testified in accordance with his answer. On October 20, 1917, plaintiffs filed an amended petition asking that Garrett Snyder, J. E. Peace and S. E. Peace be made parties. They further made an affidavit for attachment, and asked a general order of attachment against Elizabeth Moore, Charlie Moore and Garrett Snyder, and that Garrett Snyder, J. E. Peace and S. E. Peace be summoned to answer as garnishees. An order of attachment was issued against the Moores, and Snyder was summoned to answer as garnishee. A similar order of attachment was issued against Snyder, and J. E. Peace and S. E. Peace were summoned to answer as garnishees.

Thereafter, J. E. Peace and S. E. Peace filed their joint and separate answer, setting up the same facts contained in the answer of L. F. Peace, and further averring that they were ready to pay the balance of the purchase money whenever the title to the property was clear.

On March 8, 1918, James Bennett filed his petition to be made a party. After denying the allegations of plaintiffs' petition and amended petition, as well as the grounds for attachment, he set up the fact that he purchased the \$350.00 note from Garrett Snyder in due course, and paid therefor a valuable consideration, to wit, a certain house and lot situated at High Cliff in the state of Tennessee, which house and lot he conveyed to said Snyder or his wife. When he sold and conveyed said house and lot and took in part payment therefor said note, the defendant, Garrett Snyder, represented that there were no other valid liens or mortgages upon the property in lien for the \$350.00. He further asked that the petition be treated as his answer and a cross petition

against J. E. and S. E. Peace and Garrett Snyder and wife, and that he be adjudged to have a prior lien upon the Whitley county property. The court entered an order directing that the petition be filed and Bennett be made a party defendant, and that the petition be treated as a cross petition against all the defendants, including Belle Snyder, upon whom process was ordered to be issued. Process was issued against Belle Snyder and served on her.

On June 13, 1918, Elizabeth Moore and Charles Moore filed their answer and cross petition, in which it was alleged that at the time they made and executed the deed to their co-defendant, Garrett Snyder, it was understood that there were outstanding two notes for which a mortgage had been executed to plaintiffs, that there was reserved out of the purchase price of the land the sum of \$277.67, for the purpose of paying the two notes and interest due plaintiffs, that said Snyder expressly agreed to assume the payment of said two notes and interest, that if the court should be of the opinion that the provision of said deed did not create a lien to plaintiffs, then the answering defendants asked that they be adjudged a purchase money lien on said land for the unpaid part of the purchase price due them by Snyder. To the filing of the answer and cross petition, J. E. Peace and S. E. Peace objected.

On February 13, 1919, plaintiffs filed an amended petition charging in substance that it was a part of the consideration of the deed to Garrett Snyder, and was the intention of the parties, that he should assume the payment of the mortgage in favor of plaintiffs, but that, by mutual mistake of the parties, the word, "first," instead of the word, "second," was written in the deed.

By agreement of the parties, the affirmative allegations of the answer and cross petition of Elizabeth Moore and Charles M. Moore, and of the amended petition of plaintiffs were controverted of record.

On final hearing plaintiffs' petition and the cross petitions of Elizabeth Moore and Charles M. Moore and of James Bennett were dismissed and all attachments were discharged. It was further ordered that the Moores, the Peaces and Garrett Snyder recover of plaintiffs their costs, and that Garrett Snyder and Belle Snyder recover of James Bennett their costs on the latter's cross petition. From this judgment the plaintiffs, the Moores and

James Bennett, were granted an appeal, and have also prayed an appeal in this court.

The first question presented is whether the White Grocery Company and the Harden Creekmore Company may maintain an appeal. In the case of the White Grocery Company the amount involved is \$168.95, and in the case of Harden Creekmore Company, \$107.62. Our jurisdiction is limited to cases where the amount in controversy, exclusive of interest and costs, is as much as \$200.00, unless the title to land, or the right to an easement therein, or the right to enforce a statutory lien thereon, or the construction or validity of a statute, or a section of the constitution, is directly involved. Section 950, Kentucky Statutes. Here, each of the claims is less than \$200.00. Manifestly, they are separate and distinct, and though purporting to be secured by the same mortgage, can not be added together for the purpose of conferring jurisdiction. Nor can it be said that the right to enforce a statutory lien is involved. The original mortgage is a mere contract lien, and whether the deed from the Moores to Garrett Snyder be construed as an agreement on the part of the party of the first part, or the party of the second part, to assume the mortgage, the lien created by the deed would necessarily be a contract lien and not a statutory lien. From these considerations it follows that no right to enforce a statutory lien is involved, and the amount of each claim being less than \$200.00, exclusive of interest and costs, the court is without jurisdiction to entertain the appeal.

On the appeal of Elizabeth Moore and husband, the amount involved is \$277.67, or more than enough to give this court jurisdiction. It is their contention that they are entitled not only to a personal judgment against Garrett Snyder, but to a first lien on the property. In support of this position they insist that the consideration for the deed which they executed to Snyder was \$600.00 cash and the assumption by him of the mortgage in favor of the White Grocery Company for \$168.95 and the Harden Creekmore Company for \$107.62, though, by mutual mistake of the parties, the deed was so drawn as to provide that the Moores themselves should assume the mortgage. It is therefore argued that as Snyder has been relieved of all liability under the mortgage because of the judgment below, they are entitled to recover the sum secured by the mortgage, and are also entitled to a lien on the property because such sums are fixed in amount

and represent the unpaid part of the consideration. As Snyder made no defense to the claim of a mistake in the deed, and to the charge that the assumption of the mortgage was a part of the consideration for the deed, it is apparent that the Moores were entitled to a personal judgment against him. However, it is clear that they are not entitled to a lien on the property as against James Bennett, the holder of the \$350.00 note executed by the Peaces to Snyder and transferred by Snyder to Bennett. The deed as written provided that "party of the first part assumes the mortgage upon this property, etc." In other words, the Moores assumed the payment of the mortgage, and the mortgage debt was not a part of the consideration. With the deed in this condition, Bennett purchased and paid for the lien note without any notice of the alleged mistake in the deed. That being true, he was a bona fide purchaser, and the Moores are not entitled to have the deed reformed as against him. *Johnson, et al. v. Beaver Creek Fuel Co., et al.*, 190 Ky. 499; 23 R. C. L., p. 340.

The amount involved being \$350.00, we have jurisdiction of the appeal by James Bennett. The only apparent lien on the property when Bennett purchased the note was the mortgage executed by Elizabeth Moore to the White Grocery Company and the Harden Creekmore Company. Not only was this mortgage void because Mrs. Moore's husband did not unite in the mortgage, section 506, Kentucky Statutes; *Bogie, et al. v. Nelson*, 151 Ky. 443, 152 S. W. 250, but the mortgagees were denied relief by the judgment below. That being true, and it further appearing, as before stated, that Bennett was an innocent purchaser for value without notice of any mistake in the deed, it follows that as to him there were no valid liens on the property when he purchased the note. Under these circumstances the court below should have given him a personal judgment against Garrett Snyder and the Peaces for the amount of the note and interest, and awarded him a first lien on the property in question.

The appeals prayed by the White Grocery Company and the Harden Creekmore Company are denied and the judgment as to them is affirmed.

The appeals prayed by Elizabeth Moore and husband and James Bennett are granted, the judgment reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

Veach's Admr. v. Louisville & Interurban Ry. Company

(Decided March 1, 1921.)

Appeal from Shelby Circuit Court.

1. **Railroads—Crossings—Care to be Exercised at Crossings.**—A railroad crossing a public and much frequented highway is obliged to exercise ordinary care to avoid injury to persons on such highway, and if the tracks of the railroad lay in a deep cut and are so obstructed that the motorman or engineer can not see the highway on either side of the track, nor the traveler on the highway see the approach of the train on the track until within a few feet thereof, the sounding of the usual signal for highway crossing by bell or whistle on the train is not sufficient, but the trainmen must employ such other means as will reasonably safeguard persons on the highway crossing from danger by collision with trains.
2. **Appeal and Error—Damages.**—A verdict for general damages can not be disturbed by this court because it is too small.
3. **Highways—Negligence of Driver of Motor Vehicle—Guest Riding Therein.**—The negligence of the driver of an automobile is not ordinarily imputed to the guest riding therein.

BECKHAM & GILBERT for appellant.**WILLIS, TODD & BOND** for appellee.**OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.**

One bright sunshiny day in May, 1918, while Katherine Veach was, with others, riding as a guest in an automobile from Louisville in the direction of Shelbyville, Kentucky, the machine was struck by an interurban electric car of appellee Louisville & Interurban R. Co., and all five of the occupants of the automobile killed and the machine completely demolished.

This action was brought by the administrator of Katherine Veach against the Louisville & Interurban R. Co. to recover damages for her death in the sum of \$25,000, but a trial resulted in a verdict and judgment in favor of the administrator for only three thousand dollars and he appeals. The railway company is insisting on an affirmance of the judgment.

The accident happened at a grade crossing at Bonita, a small station on the interurban line near Simpsonville, on the main highway leading from Louisville to Shelbyville, Frankfort and Lexington.

The tracks of the Louisville and Nashville Railroad Company and that of the appellee Louisville and Interurban Ry. Co. parallel one another for some distance along near the place of the accident, and are only about 80 feet

apart. So in traveling the highway in an automobile from Louisville in the direction of Shelbyville the L. & N. tracks are first crossed at grade and then in about eighty feet the tracks of the interurban line are reached and crossed.

On the south-east side of the highway the tracks of both railroads lie in a deep cut and between them the dirt and rock are left in their original condition, forming a high embankment, on which at the time of the accident, weeds and grass several feet high were growing. This embankment obstructs the view of occupants of automobiles traveling towards Shelbyville on the highway so that it is impossible for them to see an approaching west bound car on the interurban tracks until within five or six feet of the tracks, nor can the motorman see an approaching automobile.

The automobile was traveling at about ten or twelve miles an hour at the time it came in contact with the interurban, while the interurban was going from twenty to twenty-five miles per hour. It is shown in evidence that the motorman in charge of the interurban car, on account of the embankment, did not and could not see the approach of the automobile to the crossing, until the automobile was within about five feet of the track. Thus it will be seen that this was, at the time of the accident, one of the most dangerous crossings to be found, and as the conditions above described had obtained for several years, and as other accidents had happened at this crossing, the interurban company must be presumed to have known of its unusually dangerous condition, for it was a veritable death trap.

In the record are several photographs which show the tracks and highways at and near the crossing, and the scrapheap that was made of the automobile. Aside from the motorman and others on the interurban car there were only one or two other persons who witnessed the accident living at the time of the trial to tell the story. Just when, if ever, the occupants of the automobile, or any of them, saw the approaching interurban car, is not known, but it conclusively appears in evidence that one in an automobile on the highway, as were they, could not see on to the tracks of the interurban to the south-east from which the car came until within about five or six feet of said tracks.

The motorman and others testified that the statutory crossing signals were given by the interurban car, and that a station signal was also given. Other witnesses tes-

tified that there was an electric signal bell at the crossing which was ringing at the time of the accident as well as after the collision. There was at the crossing the usual cross arm sign post, indicating a railroad crossing, but the evidence shows that this post was not very conspicuously located and the lettering thereon was old and rather dim. There was also such a cross arm post and electric signal bell at the L. & N. crossing nearby, and this it is contended by the administrator misled and confused persons who were strangers in that part of the country, as were decedent and her companions, into believing that the signal bell, if any was seen or heard, was one at the crossing over which they had just passed, and not at the crossing they were approaching.

Without going into greater detailed description of the place of the accident and the dangers which threatened travelers on the highway crossing, it will be sufficient to say that the crossing was so unusually dangerous as to require of the Interurban Railway Co., and its employees in charge of its cars passing over this crossing, the exercise of increased care commensurate with the known danger. It was not sufficient for the motorman to give only the statutory signals, provided for ordinary road crossing, nor were such signals and a station signal sufficient at this crossing to relieve the company of liability for such an accident. Ordinarily prudent persons operating trains over a highway crossing like this where from three to five hundred automobiles pass every day and scores of other vehicles and people on horseback and foot travel each twenty-four hours, would not run at a rate of 20 to 25 miles per hour onto a crossing, the approach to which could not be seen more than 5 or 6 feet on either side relying alone upon the ordinary statutory signals, but would employ other signals or precautionary measures to protect those who might reasonably be expected to be upon or suddenly come upon the highway crossing.

Such disregard for the life and limbs of other human beings is not common among ordinary mortals, and operators of a train who run it upon such an unusually dangerous and frequented highway crossing at a high rate of speed, are not exercising ordinary care, less than which renders them and the company liable for the injury done, unless saved by the contributory negligence of the one injured.

The administrator of Katherine Veach asks a reversal upon three grounds:

(1) Error of the trial court in limiting evidence as to the earning capacity of the decedent.

(2) Erroneous and prejudicial instructions to the jury.

(3) Diminutive, inadequate and insufficient award of damages.

The administrator was allowed to prove that Miss Veach, a woman of fifty years of age, had a business both at Chautauqua, New York, and St. Petersburg, Florida, from which she earned about \$4,000.00 per year, but the court refused to allow the witnesses to testify from a verified income tax report made out by decedent only a short time before her death as to her income. This was not error. The report was not competent evidence in her favor although made to the government for the purpose of fixing the amount of her income tax, which said statement, it is said, made as small as possible, would have been against her interest in this case. Her written verified statement could not have become evidence in her favor. There were many other ways by which the administrator could have shown the earning capacity of his decedent, but having been allowed to show that she earned \$4,000.00 the year before and had a regular business, we can not agree with counsel for appellant that the smallness of the verdict is directly or at all traceable to the failure of the trial court to admit the income tax report as evidence. No self serving declaration or statement of Miss Veach was competent when offered in favor of her administrator in this action, which would not have been competent if offered by her had she been living. *Jackson Baptist Church v. Combs*, 130 Ky. 255.

(2) Complaint is made that instruction No. 1 is erroneous because it specifically mentions the electric crossing bell in the following sentence:

"And if the jury believe from the evidence that this crossing was over a much travelled thoroughfare, and because of its location and surrounding unusually dangerous to travelers, and that the sounding of the whistle and ringing of the bell and the ringing of the electric bell stationed at the crossing was not reasonably sufficient to give reasonable notice of the approach of the car to the crossing, and the defendant knew this, or by the exercise of ordinary care could have known it, then it was the fur-

ther duty of the defendant, and its servants in charge of the electric car, at the time, to use such means to prevent injury to travellers at said crossing, as in the exercise of ordinary judgment might be considered necessary by ordinarily prudent persons operating the electric car."

The instruction would have been better had it followed the usual form and told the jury that if it believed from the evidence that the crossing was especially dangerous and that the signal from the car bell and whistle was not reasonably sufficient under the circumstances to warn travellers, then it was the duty of the defendant's servants in charge of the car to use such other means to give warning of its approach as an ordinarily prudent person operating such a car would have adopted under like circumstances. *C. & O. R. R. Co. v. Gunter*, 108 Ky. 362; *C. N. O. & T. P. Ry. Co. v. Champ*, 31 R. 1054. We have condemned instructions which have singled out and called attention to particular evidence, especially bells like the one at this crossing, but this was under somewhat different circumstances. *C. & O. R. R. Co. v. Bland*, 171 Ky. 430.

In this case the appellant recovered a verdict under instruction No. 1, from which we have quoted showing that the jury was not in any way obstructed in their finding of fact in favor of plaintiff, appellant here, for it could have returned no verdict for appellant if it had not first found that the railway company was guilty of negligence and that Miss Veach was not guilty of such contributory negligence as but for which she would not have come to her death. Having found these facts it only remained for the jury to fix the amount of the award of damages. This was not done under instruction No. 1, of which complaint is made. The amount of the verdict is very small, and we are unable to account for this, but this was a matter wholly within the discretion of the jury. Under Civil Code, section 341, which reads:

"A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, or in any other action in which the damages equal the actual pecuniary injury sustained; nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence," this court is without power to reverse a judgment for smallness of damages.

Where only general damages, as in this case, are sought, as for pain and suffering, loss of earning power,

or loss to estate by destruction of power to earn money no new trial can or will be granted on account of the diminutiveness of the damages awarded. *Taylor v. Howser*, 12 Bush 465; *Rossi v. Jewel Jellico Coal Co.*, 157 Ky. 332; *Ray v. Jefferies*, 86 Ky. 367; *C. & O. R. R. Co. v. Williams*, 179 Ky. 333; *Gregory v. Republic Coal Co.*, 189 Ky. 758.

Appellant insists that instruction E should not have been given, and we are inclined to the same view under the facts of the case. In cases where a guest in an automobile is killed through the concurring negligence of the driver of the car and a third party the negligence of the driver is not imputable to the guest, and a recovery may be had against both the driver and the third party guilty of negligence or either of them. No such instruction should have been given in whole or in part in this case, but the giving of instruction E was clearly not prejudicial for if it had been followed by the jury no recovery at all could have been had by appellant.

Judgment affirmed.

Wright, et al. v. Hunt.

(Decided March 1, 1921.)

Appeal from Warren Circuit Court.

Mines and Minerals—Oil and Gas Lease—Failure to Use Diligence in Drilling—Cancellation—Finding of Chancellor—Sufficiency of Evidence.—In an action to cancel an oil and gas lease, providing that it should become null and void and all rights thereunder should cease unless the party of the second part commenced a well within one year and continued said operations with due diligence until one well was completed, evidence examined and held to sustain the finding of the chancellor that the lessees, after commencing the well, did not continue the operations with due diligence.

BRADBURN & HARLIN for appellants.

SIMS, RODES & SIMS for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

On July 26, 1917, L. B. Hunt executed an oil and gas lease to R. L. Wright and H. G. Thayer. The lease con-

tained a provision that it should become null and void, and all rights thereunder should cease, unless the party of the second part commenced a well within one year and continued said operations with due diligence until one well was completed.

On July 2, 1919, Hunt brought suit against the lessees to cancel the lease and to enjoin further operations on the ground that the lessees had failed to continue the operations with due diligence. The chancellor granted the relief prayed for and the lessees appeal.

The only question presented is whether the evidence sustains the finding of the chancellor. It is the contention of appellants that the witnesses for appellee, with possibly one exception, knew nothing of the structure and formation of the land, or of the difficulties which had to be met, and that their testimony was of such little value that the court did not have before it sufficient facts to authorize the cancellation of the lease. There might be some merit in this contention if the witnesses referred to had testified as experts as to the length of time necessary to complete a well. This, however, they did not do. Their testimony was confined to what they saw in connection with the operations, and was to the effect that, for weeks and months at a time, Wright, who had charge of the drilling, was not engaged in drilling, but was occupied with other work. Indeed, Mr. Wright's own deposition shows that the work was not prosecuted with due diligence. He says he began drilling in April or May, 1918, and went to a depth of 102 feet. He had several breakdowns, and did not reach that depth until the following October. He then abandoned the first well and began drilling at another place. He lost three weeks on account of the death of his father, and twenty-five or thirty days because he could not get help. On that hole he went to a depth of about 80 feet. This depth was reached about December 1, 1918, and up to the time he testified, which was on August 30, 1919, he had not drilled any farther, but had spent his time fishing for tools that were lost in the hole. He was of the opinion, however, that with no breakdowns and everything going all right he could complete a well in thirty-five days. Though admitting that at other places a distance of from 15 to 30 feet might be drilled in twelve hours, he stated that he could not average more than 10 feet a day if everything worked all right. Even if this was the best that could be done, it would seem that, notwithstanding all the breakdowns and

troubles which he had, he could have drilled much deeper than 80 feet in a period of seven months. In view of this evidence, and other evidence that the usual time for drilling a well was about six weeks and never over five months, we are of the opinion that the evidence fully sustains the finding of the chancellor.

Judgment affirmed.

Debaun v. Weaver.

(Decided March 1, 1921.)

Appeal from Boyle Circuit Court.

1. Trial—Exclusion of Evidence from Consideration.—On the issue whether a machine was capable of doing the work for which it was purchased, evidence of the plaintiff that in his tests of the same it would not run successfully but that when the seller came he would do something to it and it would run again, did not authorize the court upon the mere inference drawn from this statement to take the case from the jury upon the idea that it showed the defect was not in the machinery but in the improper operation of it.
2. Trial—Statement of Issues.—Where a machine is sold for a special purpose, but consists of three separate parts: the chassis, containing the engine; a patented attachment; and plows, and the requirement of power in the engine was the essential thing involved in the purchase, the sale was one of an engine as an entirety and not of separate parts thereof, and the total failure of the engine to furnish the power necessary to accomplish the purpose was a failure of the whole, and the court properly instructed the jury that if they found for the plaintiff to find the whole purchase price.
3. Sales—Defense to Recovery of Purchase Price.—When, after tests an engine is shown to be worthless, or after discovery of a fraud in its sale the buyer offers to return the same within a reasonable time, there is a complete defense to the recovery of the purchase price; and if he has paid the purchase price under these conditions he is entitled to recover the same.

JOHN W. RAWLINGS for appellant.

JAY W. HARLAN for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

Weaver brought this action against DeBaun, alleging that the latter had sold to him in the spring of 1918, a

tractor outfit, for which he paid him at the time \$550; that the defendant warranted and guaranteed that said tractor outfit was in good condition and would do good and sufficient work and would efficiently perform and fulfil the purpose for which it was sold, which purpose was known to the defendant; that the same was not in good condition, and did not comply with the warranty and guaranty, and failed to perform or fulfill the purpose for which it was bought.

He alleges further that the tractor was worthless as a tractor, and therefore of no value to plaintiff, and that he had tendered same back to the defendant who had refused to accept it, and he again made the tender in his petition. He prayed for the return of the purchase money.

The answer was a traverse of the material allegations of the petition.

Upon a trial the jury returned a verdict for \$550 in favor of the plaintiff, and the defendant's motion for a new trial having been overruled, he has appealed.

The plaintiff's evidence was that appellant had guaranteed to appellee that the tractor outfit would do as good and efficient work as any other tractor outfit, and would pull, for the purpose of cultivating land, two plows, or a double disk harrow, or three sections of a smoothing harrow; that appellee had bought the same relying upon the warranty and guaranty of appellant and had paid the purchase price.

It was shown by the evidence of two mechanics and three practical farmers that the tractor outfit would not do the work guaranteed and was without value for the purpose intended. Appellee testified that after several tests of the tractor outfit, and after calling in appellant and others to assist in operating it, he had tendered the same back to appellant and notified him it would not do the work.

Appellant's evidence tended to show that he had made no warranty or guaranty, and that appellee had seen the identical tractor demonstrated and its work performed before he had purchased it; and that the engine in the chassis of the tractor was all right and capable of performing the work for which it was intended, but that the trouble was in appellee's operation of it and not in the engine itself.

The evidence disclosed that the engine in the chassis was not a new one but a second-hand one, and that while

for a short time it would seem to work very well, it would not continue, and in fact did not have the power to do the work for which it was intended; that DeBaun and others came to appellee's farm to assist him in running the tractor or to remedy whatever might be wrong, and that when DeBaun came on two or three occasions it would appear to work very well for a short time in certain kind of ground and on certain grades. The evidence as a whole seems to be convincing that as a practical tractor outfit it was insufficient for ordinary plowing purposes.

Appellant claims he was entitled to a peremptory instruction because the appellee himself testifies that when DeBaun came to his farm to see what was the matter with the tractor, he would do something to it and get it to running again, but that after DeBaun left, it would run for a little while and then stop again. It is argued that from this evidence it is plain that the defect was not in the tractor, or in the machinery, but was in appellee's inability to properly operate it, and therefore the defendant was entitled to a verdict.

It is sufficient, however, to say in response to this that these issues were submitted to the jury in an instruction of which the appellant does not complain. The court, under this state of the record would not have been justified, upon the mere inference to be drawn from this statement of appellant, in taking from the jury the right to pass upon the issues of fact.

The court instructed the jury that if they found for plaintiff under the first instruction, they would find for him the full purchase price of the tractor outfit, and appellant insists that this was an improper measure of damages, and that contention is based upon the claim that, as the evidence shows the tractor outfit was composed of three separate and distinct parts, and that only one of those parts was shown to be defective, the true measure of recovery should have been only the value of the defective part.

The evidence does show that the tractor outfit was composed of three separate parts; the chassis, containing the engine, which furnished the power; a patented attachment thereto; and the plows; and there is no serious complaint of either the attachment or the plows.

Appellant's contention is, therefore, that if the power was insufficient the measure of damages should have been only the cost of installing a new engine to furnish the re-

quired power, and relies upon the case of *Smith & Nixon Co. v. Morgan*, 152 Ky. 430.

That was an action to foreclose a purchase money lien on a player piano, and the defendant counterclaimed, asserting a warranty and a breach. The evidence showed that the combined instrument was composed of two separate instruments, either of which might be used independently of and separately from the other; and that the player was practically worthless but that the piano itself was a good instrument, and it was held that as the piano proper might be used separately from the piano-player, the jury should have been directed to find only the damages sustained by reason of the defect in the player part of the instrument.

A statement of the facts makes manifest the difference between the cases: in that case there were two separate musical instruments which might be used in connection with each other or each used separately from the other; but here we have a tractor outfit which as such is without value unless the power contained in the engine is sufficient to produce the required results. In that case the instruments were separable and capable of being used after separation. Here the separate parts were of no practical use without the others, for it is shown that the plows attached to the tractor could not be used in ordinary plowing with horses or mules.

The parties were dealing with a tractor outfit designed to plow land, and the requirement of power in the engine was the essential thing involved, for without that power the other parts of the outfit were of no value for the purpose.

The sale in this case was an entirety and not of separate parts of a machine, and the total failure of one essential part necessary to accomplish the purpose for which it was sold was a failure of the whole.

The evidence shows that after a thorough test of the tractor outfit, through several efforts of his own and at times assisted by appellant and other persons, it was demonstrated to appellee's satisfaction that the outfit was worthless for the purpose for which it was bought, and he then so notified appellant and offered to return the outfit, which appellant refused.

Where there has been offered a return of the property within a reasonable time after discovery of a fraud, or if the property is worthless, there is a complete defense to the recovery of the purchase price. *Barnard v. Napier*,

167 Ky. 824; Hauss v. Surran, 168 Ky. 686, 35 Cyc. 542, 548.

The plaintiff having offered in a reasonable time after discovering the fraud that had been practiced on him, to return the outfit, and the sale being the sale of a piece of machinery as an entirety, he was entitled to recover the purchase price.

Judgment affirmed.

Johnson, et al. v. Carroll, et al.

(Decided March 1, 1921.)

Appeal from Russell Circuit Court.

1. **Judgment—Collateral Attack.**—A judgment rendered by a court having jurisdiction of the subject matter and the parties in interest, is not void, though it may be erroneous, and can not be collaterally attacked, but, is subject only to a direct attack, either by appeal, or for vacation or modification as provided by sections 344, 414 and 518, of the Civil Code.
2. **Infants—Process.**—When the father of an infant defendant, under fourteen years of age is dead, and he has no guardian, and the mother of the infant is living and is also a defendant, the service of a summons upon the mother, containing the name of the infant as a defendant to the action, is a service in substantial compliance with section 52, Civil Code, and brings the infant before the court.
3. **Judgment—Process.**—The judgment of a domestic court of general jurisdiction will not upon a collateral attack be held to be void, unless the record of the action wherein, it was rendered shows affirmatively the want of jurisdiction of the court.

LILBURN PHELPS, R. E. LLOYD and MORRIS & JONES for appellants.

J H. STONE and CRESS & CHUMBLEY for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—Reversing.

This action involves the right of the appellees, William A. Carroll, Emily F. McDaniel and Jane West, to recover of the appellants, Sedalia Johnson, Addie Anderson, Ollie Anderson and W. E. Dockery, a tract of land, and which claim of right of recovery the circuit court by its judgment sustained. The land was purchased by

Paul Carroll on the 13th day of November, 1879, from one Tarter, and the vendee, Paul Carroll, caused the vendor, Tarter, to convey a life estate in the land to his wife, Nancy Carroll, and the remainder interest to his heirs. He paid only a portion of the purchase price and for the remainder executed his note, the deferred payment being shown by the deed, and a lien expressly retained to secure its payment. Subsequent to the execution of the deed, Paul Carroll became indebted to one Nelson, and to secure the payment of the debt, he and his wife, Nancy Carroll, executed a mortgage to Nelson upon the land. During the year 1881, Paul Carroll died, leaving Nancy Carroll, as his widow, and the appellees, William A. Carroll, Emily McDaniel, (*nee* Carroll) Jane West, (*nee* Carroll), and one Rosaline Carroll as his only children and heirs. Rosaline has since died intestate, leaving an only child which has long since died. The appellees, William A. Carroll, Emily McDaniel and Rosaline Carroll were children of Paul Carroll and his wife, Nancy Carroll, while Jane West was a daughter of his by a former wife. Smith Cain, as an assignee, became the owner of the two debts above mentioned, and after the death of Paul Carroll, on the 2nd day of November, 1882, brought an action in the circuit court of the county in which the land was situated and the parties resided, to enforce the liens by which the debts were secured, and to sell the land in satisfaction of the debts, and to this action he made Nancy Carroll and the appellees, William A. Carroll, Emily McDaniel, Rosaline Carroll and Jane West, the defendants. On the 3rd day of June, 1883, a judgment was rendered sustaining the contentions of Cain, enforcing the liens and adjudging that the lands be sold in satisfaction of the debts, and pursuant to such judgment and order of sale the lands were sold by the commissioner of the court on July 15, 1883, and Nancy Carroll became the purchaser at the sum of the two debts, interest and costs, and thereafter transferred her bid to one Davis, to whom, by an order of the court, made in the action, the commissioner of the court executed a deed conveying the land on December 4, 1883, and the appellants, Sedalia Johnson, et al., claim title to the land, under and through the judgment, under which the lands were sold, and the sale and conveyance made, by the authority of same, to Davis. Whether the appellees are heirs, devisees or vendees of Davis does not appear. Nancy Carroll died March 3, 1919.

The instant action being a collateral attack upon that judgment, the one question for determination is whether that judgment was void, and for that reason bestowed no title upon the vendors of appellants and did not extinguish the title of the appellees, under the conveyance made by Tarter. If the court in the action of Cain against Nancy Carroll, etc., had jurisdiction of the subject matter in litigation and all the parties in interest, the judgment could not be void, although it may have been erroneous. Of course, if a judgment is void, nothing can be either acquired or lost by it, and it neither bestows any right nor extinguishes any right which one has, and such a judgment may be collaterally assailed whenever it is offered as the foundation for an assertion of any claim or right. The distinction between a void judgment and one which is not void is that when the court attempts to render the former, a jurisdictional fact is absent, without the existence of which the court is without authority to act at all, but, if the court has jurisdiction of the subject matter, in litigation, and of the parties in interest, though its proceedings are irregular, or the conclusion as to law and facts is erroneous, so much so, that a reversal of the judgment would be had upon appeal, or it would be vacated or modified, if such was attempted, in the ways provided by the Civil Code, yet, such a judgment is not void, but is merely erroneous. When a court is clothed with jurisdiction, its judgment, being presumed to be sound, can not be called in question, except in the ways provided by the Civil Code and that is by an appeal or by proceedings to vacate or modify it, as authorized by sections 344, 414 and 518 of the Civil Code. These methods are usually denominated direct attacks in contradistinction to any other method of attack upon a judgment, and any other method of attack is a collateral one against which a judgment of a court having jurisdiction is immune. *Harrod v. Harrod*, 167 Ky. 308; *Baker v. Baker*, etc. 162 Ky. 694; *Duff v. Hagin*, 146 Ky. 792; *Ratliff v. Childers*, 178 Ky. 107; *Cheatham v. Whitman*, 86 Ky. 614; *Bentley v. Stewart*, 180 Ky. 23; *Fraize v. Walls*, 180 Ky. 168. The attack made upon the judgment, by the authority of which the lands were sold, being distinctly a collateral one, so far as this action is concerned, the judgment must necessarily be held to be valid and to have extinguished any rights, which the appellees may have once had in the land, unless the judgment is in fact void, and not merely erroneous, and being a judgment of a domestic

court of general jurisdiction, an attack upon it collaterally can not be sustained, unless the record in the action, in which it was rendered, affirmatively shows the absence of jurisdiction in the court which rendered it. *Maysville Big Sandy Company v. Ball*, 108 Ky. 261; *Bamberger v. Green*, 146 Ky. 258; *Sears v. Sears*, 95 Ky. 173; *Dennis v. Alves*, 132 Ky. 345; *Harrod v. Harrod*, *supra*.

The grounds upon which it is contended that the assailed judgment is void are set out in seven paragraphs of an amended petition, which allege that number of irregularities in the proceedings which precede the judgment, but the trial court sustained a general demurrer to each of these paragraphs, except one, and without advert- ing to the matters alleged therein, it is sufficient to say that the demurrer was properly sustained, because neither of the paragraphs to which the demurrer was sustained contained an allegation of the absence of any fact which was necessary to give the court jurisdiction of the subject matter and the parties, and certain of the fail- ures which were relied upon as irregularities are not such in an action of the character in which the judgment was rendered. The paragraph of the petition, to which the demurrer was overruled, contained an averment that the judgment was void because the three appellees and their deceased sister, Rosaline Carroll, who were the owners of the remainder interest in the land, subject to the lien for the purchase money, and the life estate of Nancy Carroll were never summoned to answer in the action, and for that reason the court did not acquire jurisdiction of them and was without authority to adjudge a sale of the land. The record in that action shows that Nancy Carroll was the surviving widow of Paul Carroll, that the appellees and Rosaline Carroll were infants, and had no guardians, and that their father was dead, and that Jane West though an infant was then a married woman and the wife of Enoch West who was joined with her as a defendant. The record, also, shows that a summons was issued for Jane West and her husband and the return of the officer thereon is to the effect that the summons was executed up- on her by delivering to her a copy, as well as to her hus- band, and this is not disputed. The petition, also, alleges that she was then above the age of fourteen years, and hence there could be no doubt of the court having acquir- ed, before rendering the judgment, jurisdiction of her. A summons was issued against Nancy Carroll, W. A. Car-

roll, Emily Carroll, now McDaniel, and Rosaline Carroll and the return of the officer upon the summons is as follows: "Executed on Nancy Carroll, W. A. Carroll, Rosaline Carroll and Emily F. Carroll by delivering to each of them a true copy of this summons, this 10th day of November, 1882." There is no explicit averment in the petition that Nancy Carroll was the mother of the three infant defendants, as that can only be inferred from the fact that she was the widow of Paul Carroll, their father, but, the record does not show, that she was not their mother. The petition further alleges, that William A. Carroll was above the age of fourteen years, and Emily and Rosaline were each under the age of fourteen years. Hence, so far as the record shows, the service upon William A. Carroll was in accordance with the requirements of the Code, as well as the service of the summons for Emily and Rosaline, as will be hereinafter shown, and the record therefore does not affirmatively show, that the court was without jurisdiction. The undisputed facts are, however, that Nancy Carroll was the mother of William A., Emily F., and Rosaline, and each of them, was under the age of fourteen years. Hence, in determining whether the court had jurisdiction of them, when it decreed a sale of the land, and whether they had been properly brought before the court by summons, as provided by section 52, Civil Code, we will treat the three as being, each under the age of fourteen years, as in fact they were. Before the judgment was rendered an affidavit, of the attorney for the plaintiff Cain, was filed in which it was deposed that William A. Carroll, Emily F. Carroll, now McDaniel, Jane West and Rosaline Carroll were infants and had no guardians in this state. A guardian *ad litem* was appointed for them, and he filed the usual answer to the effect that he had examined the record and knew of no defense to the action which could be made for them.

It is insisted that the return of the officer upon the summons against William A. Carroll, Emily Carroll, now McDaniel, and Rosaline Carroll shows that it was not served upon their mother for them as required by section 52 of the Civil Code, when under fourteen years of age and in the absence of a father or guardian, but that the service was upon them personally, and they each being under the age of fourteen years, such service did not give the court jurisdiction of them, and the appointment of a

guardian *ad litem* was not authorized, until some one was summoned for them as required by the Code provisions, *supra*. Hence the only question to be determined, and which determines whether the judgment of the court was void, is whether or not the service of the summons, as shown by the return, substantially complies with the requirements of the Code, and thus gave to the court jurisdiction of the persons of the three infant defendants. Not having any statutory guardian, and their father being dead, and they each under the age of fourteen years, their mother, Nancy Carroll, was without question the party upon whom a summons for the three infants should have been served. Section 52, *supra*, is as follows: "If the defendant be under the age of fourteen years the summons must be served on his father, or, if he have no father, on his guardian; or, if he have no guardian, on his mother; or, if he have no mother, on the person having charge of him." The case of *Rodgers, etc. by etc. v. Rodgers*, Admr. 17 K. L. R. 358, presented a similar state of facts upon the record. The petition showed that the father of the infants was dead, that Annie Rodgers was their mother, but did not show that they had no guardian. Annie Rodgers was, also, a defendant in the action and the return of the officer upon the summons was as follows: "Executed April 12th, 1892, on Sophia Rodgers, Catchie Rodgers, Mary Rodgers and Annie Rodgers, by giving to each of them a copy of this summons." The three first named were infants and under fourteen years of age. This court after holding that although the petition did not show that the infants had no guardian, it was presumed that there was none from the action of the officer in executing the summons upon the mother as the presumption was that the officer had performed his duty as by law required, then said: "It is true that the return shows that a copy of this summons was unnecessarily delivered to each of the infants, and that it fails to show that the copy delivered to Annie Rodgers was delivered to her as their mother, still we are of the opinion that within the reason and spirit of previous adjudications of this court, the service of the summons as shown by the return was good against these infants." One of the previous adjudications was that of *Cheatham v. Wirgman*, 86 Ky. 614, in which a proceeding under the Code of 1851 was dealt with. The provisions of that Code required in an action against an infant under fourteen years of age, that the

service of a copy of the summons against an infant should be made upon the father or guardian if such there were; also. The father of the infant in that case was a defendant in the action in which the assailed judgment was rendered, as the mother of the infants was a defendant in the case in which the assailed judgment in this action was rendered, and the officer made a similar return upon the summons to the one under consideration here. This court held the service upon the infant sufficient, and referring to the Code, said: "Undoubtedly the object of this provision was to bring notice to one who would naturally feel interest in the infant to see that his rights were protected. The purpose of a summons is to give notice." In the opinion it was further said: "In the case now in hand, while the father of the infants was a party to the suit, yet the return on the summons does not show that it was served on him as the father of the infant defendants. It was executed on him as a party to the suit. But considering the reason for the rule furnished by the Code, why was not this sufficient as to the infant? They together with the father were named in the copy of the summons, that was delivered to him, as defendants. He was thereby notified that they had been sued. There was no need of delivering a second copy to him as their father. The reason of the law had been fulfilled and its object accomplished." A similar holding was made in *Louisville Industrial Exposition v. Johnson*, 10 Ky. Op. 333; *Bailey v. Fanuing Orphan School*, 12 K. L. R. 644 and in *Donaldson v. Stone*, 11 R. 27. Previous to the Code of 1851 it was not necessary to personally serve an infant, under fourteen years of age, with a summons, and if a guardian *ad litem* was appointed and defended for him, the judgment rendered was held not to be void but merely erroneous. *Bank of U. S. v. Cochran*, 9 Dana 397; *Benningfield v. Reed*, 8 B. M. 102; *Bustard v. Gates*, 4 Dana 429.

Under the Code of 1851 the legislature provided for more certainty for the defense of an infant's rights by requiring the summons when the infant was under fourteen years of age to be served upon him and, also, served upon his father or guardian, and under the present Code, sec. 52 thereof which was in force when the action of *Cain v. Nancy Carroll*, etc., was instituted, requires that the summons for an infant, under fourteen years of age, be served upon the father; and if no father, on his guardian; and if no guardian, on his mother; and if no mother, on

the person having charge of him, the purpose being to give notice to the person having the greatest interest in the infant, of the pendency of the action, and the provision of the present Code dispensed with any necessity of a service upon the infant himself as being a useless thing to do, where one was of such tender years. In the action of *Cain v. Nancy Carroll, etc.*, the summons that was directed against the infant defendants, who were her children and under fourteen years of age, contained her name as a defendant, and, also, the names of each of the infants as defendants, and when a copy of it was delivered to Nancy Carroll, the mother, it necessarily conveyed to her the information that her infant children had been sued and communicated that notice which was intended by section 52, *supra*, and it would have been a useless matter to have delivered to her another summons for each of the infants. The delivery to her of a summons containing the names of the infants as defendants to the action, in the language of *Cheatham v. Wirgman, supra*, fulfilled the reason of the law and accomplished its object. Under the doctrine of the foregoing cases the service upon the three infant children of Nancy Carroll, two of whom are appellees here, by delivering to Nancy Carroll a copy of the summons, although her name was embraced in it as one of the defendants, was a sufficient service under section 52 of the Code upon the three infant defendants, and brought them before the court, and the delivering of a copy of the summons to each of the infants, as it appears the officer did, while unnecessary, did not affect the validity of the service which was accomplished by delivering to the mother a copy of the summons containing the names of each of the infants as defendants, and the court thus having jurisdiction of the subject matter of the action as well as persons of the defendants, its judgment decreeing a sale of the land was not void, although for irregularities and errors in it, it might have been reversed upon appeal.

The judgment must therefore be reversed and remanded with directions to set aside the judgment appealed from and to dismiss the action.

Blakely, et al. v. Wilson, et al.

(Decided March 1, 1921.)

**Motion to Dissolve Temporary Injunction Granted by the
Warren Circuit Court.**

1. **Mines and Minerals—Grants and Reservations of Minerals.**—When the language employed in a deed conveying land to one grantee and the mineral to another, indicates that the one is to take only the surface with improvements and timber and the other all the mineral, this will include the oil and gas.
2. **Mines and Minerals—Enjoining Surface Owner.**—The owner of the entire mineral estate may enjoin the surface owner from taking the oil and gas from the land.

SIMS, RODES & SIMS for plaintiffs.

BRADBURN & HARLIN for defendants.

**OPINION OF THE COURT BY JUDGE SAMPSON—Overruling
motion to dissolve injunction.**

In 1906, Lewis Oberle and wife made a deed for a forty acre tract of land and mineral in Warren county to John Hudson and W. H. Blakely which, in so far as pertinent, reads as follows:

“This indenture made and entered into this the 18th day of September, 1906, by and between Louis Oberle and Carrie Oberle, his wife, of Jefferson county, Kentucky, parties of the first part and John Hudson and W. H. Blakely, of Warren county, state aforesaid, parties of the second part,

“Witnesseth, that for and in consideration of the sum of three hundred dollars, cash in hand, the receipt whereof is hereby acknowledged, that said first parties have this day bargained and sold, and do by these presents, bargain, sell and convey unto the parties of the second part, severally, all of their right and title to and interest in the following described parcel of land, of which there is conveyed the land and improvements, timber, etc., to John Hudson and to W. H. Blakely the mineral rights under and on said land, such as coal, iron, stone and other mineral, and the right to remove the same, including the removal of any soil necessary to mine same, said land lies in Warren county, Kentucky, and is about 4½ miles west of Bowling Green, and is bounded as follows, viz: . . .

“To have and to hold the said above described tract of land unto John Hudson, his heirs and assigns, and the mineral and stone rights on and under the same to W. H. Blakely, his heirs and assigns, with all and singular appurtenances thereunto belonging, forever, with covenant of general warranty.”

Hudson conveyed his interest to defendant Rigglewood, in the same year, and Rigglewood leased the premises for oil and gas to defendant Wilson in 1919. About the time this litigation began in December, 1920, Wilson was threatening to move an oil well drilling machine upon the property to explore it for oil and gas under the lease aforesaid. To prevent this the heirs of Blakely, who is dead, instituted this action and obtained a temporary injunction restraining Wilson from so doing.

The motion by Wilson, before me, a judge of the Kentucky Court of Appeals, is to dissolve the injunction.

In as much as Oberle and wife by their deed divested themselves entirely of all interest in and claim to the forty acre tract of land and mineral it passed to the grantees named therein, Hudson and Blakely, the first taking the land and improvements, timber, etc., while the latter took “the mineral rights under and on the land, such as coal, iron, stone and other minerals, and the right to remove the same,” in severance, not jointly.

Hudson took only what was granted him by the deed, no more. The grant to him is clearly of the surface soil, with improvements and timber, all of which relates wholly to the top of the ground and nothing thereunder, except such things as appertain to agriculture. The use of the words “improvements” and “timber” makes certain this intention.

Hudson was, therefore, granted only the surface with all improvements and timber. Blakely was granted the “mineral rights on and under the lands such as coal, iron, stone and other minerals.” The grant to Blakely was broad enough to carry all minerals including oil and gas and no doubt this was the intention of the parties. But the grant to Hudson, read in the light of all the provisions of the deed, was not sufficiently broad to carry the minerals or any of them.

If Oberle had granted the minerals to Blakely by a separate instrument and later had conveyed the lands to Hudson, we would have a different case, which it is not necessary here to discuss.

Rigglewood, the grantee of Hudson, made the oil and gas lease to defendant, Wilson; therefore Wilson's rights in the minerals are no greater than were Hudson's. The peculiar facts of this case make it distinguishable from the cases of McKinney v. Central Ky. Natural Gas Co., 134 Ky. 239; Scott v. Laws, 185 Ky. 440; Hudson & Collins v. McGuire, 188 Ky. 712, and other similar cases. The rule there announced is adhered to.

The general demurrer to the petition was properly overruled while the demurrer to the answer was properly sustained.

Wherefore it follows that the temporary injunction was properly granted by the court below, and the motion made before me to dissolve the injunction is overruled.

Chief Justice Hurt, and Judges Settle and Clay sat with me in the consideration of this motion and concur in the conclusions reached.

Fischer, Admr., et al. v. Lange, et al.

(Decided March 4, 1921.)

Appeal from Kenton Circuit Court (Common Law and Equity Division).

1. Wills—Per Capita Distribution.—Where the subject of a testamentary disposition is directed to be "equally divided," or to be divided "share and share alike," or where similar words are used which indicate an equal division between or among two or more persons, a per capita distribution will be made of the property, unless a contrary intention is discoverable from the language used in the will.
2. Wills—Construction.—A testator in devising the remainder of his property after making specific devises said: "I give, devise and bequeath in equal shares to my said daughter, E. A. F., and the two children of my deceased daughter, E. L. and N. L., . . . to them, their heirs and assigns forever." There was no word or expression in that clause nor in any other part of the will indicating the character of division which should be made of the property therein mentioned among the devisees mentioned. Held, that under the rule first stated above a per capita division should be ordered of the property.
3. Wills—Funeral Expenses of Life Tenant.—None of the corpus of an estate may be applied to the payment of funeral expenses or debts of the life tenant of the property, who was also executrix of the will under which she held it, and an administrator de bonis

non of the testator, after the life tenant's death, can not receive credit for the amount of such debts which he paid after the death of the life tenant.

4. **Costs—Question of Allowance Upon Appeal.**—Questions of allowances of cost in equity cases are to be governed largely by the facts of each case and to be apportioned by the trial court in the exercise of a sound discretion, which will not be disturbed on appeal unless it has been abused.
5. **Descent and Distribution—Attorneys' Fees.**—Where the attorneys for the devisees who brought a suit to settle and divide the estate succeeded in charging the administrator with a substantial sum it is proper to allow plaintiffs a reasonable attorney's fee to be paid out of the funds of the estate.
6. **Executors and Administrators—Costs of Settlement of Estate.**—An administrator will not be charged on final settlement of his estate for uncollected rents of the property of his decedent where he has acted with reasonable diligence and business prudence in the management of the particular character of property in his charge.

JOHN E. SHEPARD for appellants.

FRED W. SCHMITZ for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming on the original and on the cross appeal.

On the 10th day of March, 1896, Francis J. Rottinghaus died testate a resident of Kenton county. His will, thereafter probated in the Kenton circuit court, directed the payment of his debts and then gave to his wife, Gesina Adelheid Rottinghaus, the remainder of his property, both personal and real, for her use during her natural life. After her death he devised his residence in Covington to his daughter, Elizabeth Anna Fischer, the wife of appellant, and defendant below, Fred A. Fischer. The fourth paragraph of his will is in these words:

"All the rest and residue of my estate so remaining after the death of my said wife, I give, devise and bequeath in equal shares to my said daughter, Elizabeth Anna Fischer, and the two children of my deceased daughter, Elmer Lange and Norbert Lange, to have and to hold, to them, their heirs and assigns forever, excepting, however, that the sum of two hundred dollars shall be paid to Fred Lange, my son-in-law, before the division of said remaining estate shall take place."

The fifth paragraph appointed testator's wife executrix of his will "without any bond or inventory of my estate to be required of her by the Kenton county court,"

and directed that at the death of his wife his son-in-law (defendant Fred A. Fischer) qualify as executor *de bonis non* and without bond. Upon probate of the will the widow qualified as executrix but she executed no bond, nor were there any appraisers of the estate appointed nor any motion made therefor. The executrix took charge of the property left by the testator and continued to discharge her duties as such until her death in 1906, when defendant, pursuant to the request made in the will, was appointed administrator *de bonis non* of the estate of testator and took charge of the property left by him and continued thereafter to discharge the duties of that position.

On November 24, 1917, this suit was filed in the Kenton circuit court by the grandchildren of testator (who are two of the devisees mentioned in the fourth paragraph of the will) Elmer H. Lange and Norbert Lange, who are the children of a deceased daughter, against the defendant Fred A. Fischer and his wife, Elizabeth Anna Fischer, seeking a settlement of the estate and the payment to them of their share of it under the will. Much evidence was taken and there were some three or more references to the master commissioner, who reported the condition of the defendant's accounts as administrator with the will annexed, to which reports various exceptions were filed, and upon final submission the court rendered judgment charging the administrator with \$4,151.98 as being the balance in his hands for distribution, and adjudged that he had overpaid his wife the defendant, Elizabeth A. Fischer, the sum of \$1,323.72. It was further adjudged that there was a balance of \$2,075.99 due each of the plaintiffs and defendant was ordered to pay to each of them that sum less their part of the costs, and Mrs. Fischer was ordered to pay to the administrator the amount which she had been overpaid, the costs being divided between the parties. From that judgment defendants, Fischer and wife, prosecute this appeal and plaintiffs moved for and obtained in this court a cross appeal.

The administrator makes a number of complaints against the judgment on his appeal, among which are that he was not credited with a note of \$1,000.00, which he borrowed in his fiduciary capacity from a bank directly after his appointment, and the interest paid thereon; that he was improperly charged with interest on accrued balances in his hands; that the judgment improperly allowed an attorney's fee of \$500.00 to plaintiffs' attorney;

that he was not credited with the legacy of \$200.00 to Fred Lange, mentioned in paragraph four of the will; that he was not credited with the funeral expenses of Mrs. Rottinghaus, and the expense incurred in looking after and taking care of the lot upon which testator and his wife were buried; that he was not credited with \$418.08 due to John H. Fischer Sons, a company in which the appellant was the principal member and in which he was most chiefly interested; and finally, that the court improperly construed paragraph four of the will in directing a per capita distribution of the property therein mentioned between the two plaintiffs and Mrs. Fischer instead of a division *per stirpes*, i. e., one-half to Mrs. Fischer and one-half to the two plaintiffs.

On the cross appeal the judgment is criticized because it failed to charge the administrator with \$1,453.25, the amount of rents which he failed to collect from tenants occupying the two pieces of real estate owned by testator (one in Cincinnati, O., and the other in Covington, Ky.), other than his residence; that the court erroneously allowed the sum of \$500.00 jointly to the administrator and his attorney and failed to charge the administrator with the entire cost of this litigation.

The testator at the time of his death owned three pieces of real estate, two located in Covington, one of which was his residence, and another located in Cincinnati, Ohio. This property, outside of his residence, was in a very much dilapidated and run down condition. The Covington property rented for only ten dollars per month, when a tenant could be procured, and the most that the Cincinnati property ever rented for was thirty-five dollars per month. At the time of the testator's death he owned 104 shares of stock in a Cincinnati street railway company, of the par value of \$100.00 per share, but worth only \$50.00 per share. After Mrs. Rottinghaus qualified as executrix she obtained six other shares of that stock which was issued to the estate which she represented. During her administration of the estate she made no settlements whatever, nor is there anything in the record to show what other property than that mentioned went into her hands. The only matter of record pertaining to the ten years of her service is an affidavit which she filed in the county court and in which she stated that she had paid all of the debts of her decedent. Whether the testator had any money in bank or any notes or accounts due

him it is impossible to determine. The same is true as to whether Mrs. Rottinghaus had any separate estate of her own, either before her husband's death, or while she acted as executrix, or whether she left any at the time of her death. She kept no account of any collections or payments as executrix of her husband's will and if she had any private property she failed to keep any account of it or any payments made with it. The same neglectful course seems to have been pursued by defendant, Fred A. Fischer, after his appointment as administrator. The only data from which he was able to make anything like an intelligent statement of his accounts were checks and check stubs which he, and which his firm, through which he made some of the collections and payments, had preserved.

Under these circumstances and conditions we do not think the court erred in adjudging the six shares of street railway stock, acquired after the testator's death as a part of his estate. Payment by appellant of the funeral expenses of the widow and the account of John H. Fischer Sons and the expense in taking care of the cemetery lot, and some other items which Mrs. Rottinghaus verbally directed her son-in-law to pay for mass celebrations, as we gather from the record, were paid out of the proceeds of the \$1,000.00 note above mentioned, and we have examined the record in vain to find any legal ground upon which the appellant is entitled to credit therefor. They were debts either owed by, or for the exclusive benefit of Mrs. Rottinghaus, who, as we have seen, left no property in her name and, she being only a life tenant, such claims could not be a legal charge against the remaindermen or against the estate of which she was the personal representative. It is insisted, however, that plaintiffs are estopped to contest these items since, as claimed, they by their silence and acquiescence consented for the plaintiff to pay them. We find no evidence in the record supporting this alleged estoppel. The plaintiffs were infants at the time, of comparatively tender years, and even if they could be estopped by such conduct, as is relied on, there is nothing to show that any of the payments involved were made with any knowledge on their part and there is no foundation for this contention.

The record shows appellant to be mistaken in his contention that he was not allowed credit for the \$200.00 devise to Fred Lange, and likewise mistaken when he says that the judgment charged him with compound interest

on the balances in his hands after the first two years of his administration. We have examined the record closely and find no merit in either of these complaints. Neither did the court err, under the facts and circumstances of this case, in allowing plaintiffs a reasonable attorney's fee. The administrator in his report after the suit was filed claimed that the estate was due him the sum of \$735.00, whereas, as we have seen, he was charged in the judgment with \$4,151.98. Thus it will appear that plaintiffs by this suit augmented the assets of the estate, above what appellee admitted, nearly \$5,000.00, and we think the fees allowed their attorneys were proper and the amount reasonable.

This brings us to the chief point in the case, which is the construction of paragraph four of the will. The appellant, in support of his contention that a *per stirpes* division should be made thereunder, relies on the cases of Lachland Heirs v. Downing's Extrs., 11 B. Mon. 32; Bethel v. Major, 24 Ky. L. R. 398; Armstrong v. Crutchfield, 150 Ky. 643; White v. White, 168 Ky. 753, and cases referred to therein; while plaintiffs in support of an opposite contention, in favor of a *per capita* division rely upon the cases of Purnell v. Culbertson, 12 Bush 369; Kaufman v. Anderson, 31 Ky. L. R. 888; Justice v. Stringer, 160 Ky. 365; McFatridge v. Holzclaw, 94 Ky. 352; Hughes v. Hughes, 118 Ky. 756; Potts v. Shirley, 28 Ky. L. R. 872; and the Armstrong, and the White cases relied on by appellant. In the recent case of Prather v. Watson, 187 Ky. 709, the same question was presented as is involved on this appeal. In that opinion the cases relied on by both appellants and appellees, together with many others, are referred to and discussed. The rule was there laid down in accordance with the settled doctrine for the construction of wills that: "Where the subject of a testamentary disposition is directed to be 'equally divided,' or to be divided 'share and share alike,' or where similar words are used which indicate an equal division between or among two or more persons, the persons between or among whom the division is to be made take *per capita*, 'unless a contrary intention is discoverable from the will.'" 40 Cyc. 1490. It was further therein held that where such words were used by the testator, and there was nothing within the will indicating a contrary intention, it would be presumed that the testator meant a *per capita* division, which would be ordered "unless a con-

trary intention is discoverable from the will." The language of the paragraph of the will there involved was: "I want my land, containing about 400 acres, sold and the proceeds to be divided equally between E. C. Watson and Sheffie Bridges and my two grandchildren, Sheffie Watson and Shaftor Watson, Walter's heirs. Now I have let E. C. Watson have three thousand dollars. I hold his note for same. Said notes is to be equally divided, same as above land." It was held that the testator meant therein to direct a *per stirpes* division. This conclusion was bottomed almost entirely upon the use of the words "Walter's heirs" in that paragraph of the will, and that this fact, with the additional one of conjoining the three devisees or classes with the conjunction "and," indicated an intention on the part of the testator to divide his property among three classes; one to his son, E. C. Watson; another to his daughter, Sheffie Bridges, and another to the two named children of his deceased son, Walter, whom he designated as "Walter's heirs;" showing that he intended them to take in a representative capacity, as heirs of his deceased son, and that their combined share should be limited to whatever Walter would get had he been living. We have in the instant case no such indicative expressions as contained in the will under consideration in the Prather case. Nor is there any expression in any other part of the will of Mr. Rottinghaus indicating in the slightest degree a purpose to divide his property in any other way than according to the well settled rule, *supra*, where the language of the will comes within the terms of that rule. The testator in the instant case, in the fourth paragraph of his will, bequeathed his property "in equal shares" to his daughter, naming her, and to his two grandchildren, naming them, and stating that they were the children of his deceased daughter. If there could possibly be framed a case coming strictly within the general rule for the interpretation of wills, where this question is involved, this to our minds, is one of them. There is no expression, either in that clause or in other parts of the will, indicating a contrary intention, and the court correctly held that a division *per capita* should be made. We deem it unnecessary to further elaborate the question or to discuss the cases dealing therewith, since this was done in the recent Prather case and no good purpose could be accomplished by repeating it here.

On the questions raised by the cross appeal we deem it necessary to say but little. The principal item involved in it is that of \$1,453.25, rents which appellant failed to collect. As before stated the property rented was very much dilapidated and situated in such localities as not to be inviting to a lucrative business, even if the property had been in condition in which to conduct such a business. Necessarily a class of tenants who were engaged in an unstapled business were the only ones who could be induced to occupy the property and we find nothing in the record showing such dereliction on the part of appellant as would authorize the court to charge him with this item or any part of it. Neither do we think the court erred in allowing appellant compensation for his services, or in allowing him the very moderate attorney's fee which the court fixed. Questions of this character, as well as the one concerning cost, are largely within the sound discretion of the court, to be exercised under the peculiar facts of each case, and its discretion will not be disturbed on appeal unless flagrantly abused. We do not find such abuse in this case and have reached the conclusion that the judgment should be affirmed on both the original and cross appeal, which is accordingly done.

George v. George.

(Decided March 4, 1921.)

Appeal from Pike Circuit Court.

1. Divorce—Domicile of Wife.—The general rule, that the residence or domicile of the wife is that of her husband, does not prevail in divorce proceedings where the wife may establish for herself a residence or domicile which will govern her right to proceed against her husband to procure a cancellation of the bonds of matrimony, and if she retains the matrimonial domicile after her husband has abandoned her she will be deemed to have elected to make it her separate residence and domicile.
2. Divorce—Grounds—Domicile of Wife.—Under our statute (section 2120), before a plaintiff in a divorce suit may maintain the action in this state, and before the court will take jurisdiction of the cause, it must be alleged and proven that plaintiff has been a continuous resident of this state for at least one year before filing the suit and that she or he was a resident of this state when the cause of action accrued, and if it accrued out of this state it must

be alleged and proven that it was a ground for divorce under the laws of the state where it occurred.

3. Divorce—Actual Residence.—Residence within the meaning of the statute means "actual residence," *animus marendi*, but where the marital domicile was in this state and the parties were residents of this state at the time the cause of action occurred, a temporary absence from the state with no intention to abandon it as a residence will not destroy the "actual residence" in this state.
4. Divorce—Alimony.—The above rules, however, do not apply in suits for alimony only, which may be maintained independently of one for a divorce. Such independent alimony suits are transitory in their nature and are furnished to the wife as a remedy to compel the husband to discharge his marital obligation to maintain and support her, and that court where the husband may be found and served with process has jurisdiction to hear and determine the controversy.
5. Divorce—Grounds—Living Apart Without Cohabitation.—The ground for divorce of "living apart without any cohabitation for five consecutive years next before the application" occurs where the separation took place, and not at the place where the husband located after the separation, and where he resided until the expiration of the time.

R. H. COOPER for appellant.

No brief filed for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellant and plaintiff below, Mary J. George, and the appellee and defendant below, E. E. George, are husband and wife. They were married on October 13, 1892, in the state of Michigan. Children were born to them and they lived together in that state of their matrimonial domicile until 1913, when defendant, as alleged in the petition, abandoned plaintiff without cause and came to the state of Kentucky and located in Pike county, since which time, as alleged, he has accumulated a considerable amount of property consisting in the main in coal mining operations. Plaintiff continued to reside at the matrimonial domicile in Michigan and has never had an actual residence or an actual domicile in Kentucky. In January, 1920, she filed this suit in the Pike circuit court (the place of defendant's residence) against him seeking an absolute divorce upon the ground of "living apart without any cohabitation for five consecutive years next before the application." Plaintiff also asked an allowance of \$20.00 per week alimony and that defendant be required to pay her that sum. The defendant was served with

process but he failed to appear and made no defense to the action. Upon final submission, after proof taken, the court dismissed the petition and declined to adjudge the plaintiff any relief whatever, and complaining of that judgment she prosecutes this appeal.

The record does not inform us as to the ground upon which the court acted, but we think, as will hereinafter appear, the court was justified in dismissing the action in so far as it sought an absolute divorce upon two grounds: (1) want of jurisdiction to grant the divorce because plaintiff was not a resident of this state and had not been continuously so for one year next before the institution of the suit, as is required by section 2120 of the statutes, and (2) that plaintiff did not allege or prove that the cause of divorce relied on was one given by the laws of Michigan where she resided, and where the separation occurred as is also required by the same section of the statutes.

The first reason stated is challenged by plaintiff's counsel because it is insisted that the general principle of law making the domicile of the wife follow that of her husband, and likewise as to the residence of the wife, applies in divorce cases and that plaintiff has all the while since the separation been a constructively resident of the state of Kentucky and constructively domiciled therein, notwithstanding she has been actually domiciled in, and been an actual resident of the state of Michigan during that time. To this proposition we can not agree. An exception to the rule that a wife's domicile or residence is constructively that of her husband is quite universally recognized by courts and text writers to exist in divorce proceedings, and it is held that either spouse may acquire a separate residence or domicile after the *delictum*, and that the right to maintain divorce proceedings will be governed by the local law of the acquired residence or domicile. This exception to the general rule is thus stated in section 112, Vol. 2, of Bishop on Marriage, Divorce and Separation: "The relation of husband and wife, considered without reference to divorce, makes their habitation one, the husband to determine where it shall be; so that in law her domicile is said to follow his. But a rule of law is qualified by and ceases with the reason whence it is derived. Therefore this rule can not prevail in a divorce cause, founded on the allegation of a *delictum*, which legally justified a living apart, and took away the husband's right to fix the domicile of the wife. For the allegation of

the *delictum* and the allegation or assumption of a domicile in her derived from his would be repugnant, consequently bad in law. Necessarily, therefore, the law must and does permit separate domiciles for divorce."

The subject is extensively discussed in the annotation to the case of Succession of Benton, reported in 59 L. R. A., on page 135. On pages 146, 147 and 149, of the annotation referred to, it is specially pointed out that in cases where it is proper or necessary (which means after the occurrence of the *delictum*) a wife may acquire for the purpose of a divorce a separate residence or domicile from that of her husband and that if she remains at the matrimonial domicile after he has left it she thereby elects to make it her domicile, and that she can not have another one by construction at the place where her husband is located. In the work of Mr. Bishop, *supra*, section 119, this particular feature of the wife retaining the matrimonial domicile as hers after abandonment by her husband who locates in a different state, is specifically dealt with and the cases of Hopkins v. Hopkins, 55 N. H. 474; Schonwald v. Schonwald, 2 Jones Eq. (N. C.) 367; Kruse v. Kruse, 25 Mo. 68; Pate v. Pate, 6 Mo. App. 49, and Dutcher v. Dutcher, 39 Wis. 651, are referred to. In each of them facts exactly similar to those in the instant case were involved. The husband in each of them left the wife at their matrimonial domicile where she remained and afterwards sued him in his newly acquired domicile, but the courts refused her a divorce upon the ground that she was not a resident of the forum.

A short excerpt from the Hopkins case will serve as an illustration of the rule announced by the author, and by the opinions in the cases referred to. In that case the court said: "When the husband abandoned his wife, necessity of separate and independent existence gave her a separate residence and domicile; and when he came into this state leaving her in Massachusetts, her domicile remained there with her, and there it still continues." To the same effect are the notes to the case of McGrew v. Mutual Life Insurance Co., 84 Am. S. R. 20, and Locke v. McPherson, 85 Am. S. R. 546, on page 562; note to the case of Carty v. Carty, 38 L. R. A. (N. S.) 297; 9 R. C. L. 400, 401, and 19 Corpus Juris, 31, 36. In the Ruling Case law, referred to, on page 401, the doctrine applicable to the facts of the instant case is thus stated: "Where husband and wife have separated and the husband moves to another state and establishes his domicile there, it has

been held that his wife does not also thereby become domiciled in that state so as to enable her as a resident thereof to sue her husband for a divorce. The reason given for this ruling is that the domicile of the husband can not be regarded as fixing that of his wife for the purpose of an original action for divorce by her." Some few cases hold that when the husband abandons the wife she may sue him at his newly acquired domicile although retaining the matrimonial domicile as her residence, but they do not follow the logic of the law, by failing to recognize the distinction between the rule in ordinary cases and the exception to that rule as applied in divorce cases, and in some of them there is a confusion in the opinions between jurisdictional matters and questions relating to venue within the jurisdiction.

Counsel for plaintiff argues in his brief that this court has arrayed itself with the latter class of cases which uphold the right to a non-resident wife to sue her resident husband in the county where he lives, under the general doctrine that the residence of the wife follows that of her husband. In other words, he insists, that this court is committed to the rule that a constructive residence of the wife is sufficient to meet the requirements of our statute, that a plaintiff in order to maintain an action for divorce must be "a continuous resident of this state for a year next before its institution" (section 2120 statutes), and in support of this contention he cites the cases of *Beckett v. Beckett*, 17 B. Mon. 370; *Hall v. Hall*, 102 Ky. 297; *Dunlop v. Dunlop*, 3 Ky. L. R. 20; *Boreing v. Boreing*, 114 Ky. 522; *Cummings v. Cummings*, 133 Ky. 1; *Miller v. Miller*, 141 Ky. 681, and *Peterson v. Peterson*, 156 Ky. 202.

An analysis of the opinions in those cases will serve to point out the error of counsel. In the *Beckett* case, the cause of divorce, if it existed at all, arose outside of Kentucky. The two grounds relied on were, five years living separate and apart, and one year's abandonment of the wife (plaintiff) without her fault. The statute then in existence was the same as it is now (being a portion of section 2120) that the suit would not be entertained, unless the party complaining had an actual residence here at the time of the doing of the act complained of; nor shall a divorce be granted for anything done out of this state, unless it was also a cause for divorce by the law of the country where the act was done. It was held that the living separate and apart for five years (there relied on) occurred at the place of the separation or abandonment,

and that at that time plaintiff was not a resident of this state although before bringing the suit she located in Louisville where she had resided for more than one year. As to the one year's abandonment it was not alleged that it was a ground of divorce at the place where the abandonment occurred. There is nothing in the opinion even remotely supporting contention of counsel, but on the contrary the opposite view was upheld.

In the Hall case, the question decided was that a wife, whose matrimonial domicile was in California, might acquire a residence in this state separate from that of her husband, who remained in California, for the purpose of giving the courts of this state jurisdiction of a divorce suit brought by her for causes occurring in California and which were grounds for a divorce in that state. This case supports the general rule, as announced in the authorities first referred to above, upholding the exception in divorce cases to the general rule that the domicile or residence of the wife follows that of her husband.

In the Boreing case the matrimonial domicile was in Kentucky, where the separation occurred, but afterwards the wife, in order to maintain herself, secured clerical positions and positions as teacher in schools at places outside of this state, but there was nothing in the record to show that her absence from the state was anything more than temporary, or that she had ever abandoned the state of Kentucky as her actual, as well as legal, residence and domicile, *animus manendi*. On the contrary the court in its opinion said: "We do not think that appellant lost her residence in Kentucky by the fact that, in order to maintain herself, she left the state; she was still the wife of appellee, and his residence was her residence, and continued to be so during all of the time that she was absent. The separation commenced in Kentucky, and, if it be necessary, in order to obtain a divorce on the grounds relied upon in this action, that her home should have been in Kentucky during the five years specified, we think that the facts in this case show that appellant had the necessary residence here."

In the Cummings case, the separation occurred in Kenton county, where the parties had resided during their entire married life. After the separation the wife secured a situation at Columbus, Ohio, for the purpose of earning a living, but would frequently return to Covington on visits, and the court said: "Her going to Columbus was simply because she secured employment there

in a chemical laboratory. She is only there for the purpose of making a living, and always speaks of Covington as her home. She has acquired no domicile there, and the suit was brought in the county in Kentucky in which alone she has had her home."

A similar state of facts is found in the other cases relied on, but in some of the opinions the expression "the domicile of the husband is in law the fixed residence of the wife" is loosely used, when, under the facts developed that question did not arise and there was no necessity for the statement.

The Dunlop case is the only one from this court which gives color to the contention of counsel, but in that case the parties from the time of their marriage until their separation resided in the state of Kentucky. The wife returned to her parents in Virginia after their separation and afterwards brought suit for divorce against her husband, who continued to reside in Jefferson county, Kentucky. The suit was dismissed by the trial court because the plaintiff did not have the required residence in this state at the time it was filed. This court reversed the judgment, holding that her departure from the state after the separation and returning to her people in Virginia did not constitute an abandonment of her marital domicile here in Kentucky, and said: "That fact will not be regarded as a change of residence or domicile so as to give the foreign state or territory jurisdiction to annul the marriage contract." So that the opinion ultimately upheld the jurisdiction because plaintiff had not abandoned her marital residence and domicile. If, however, it was meant in that opinion to hold that only constructive residence of the wife, when she was plaintiff, would meet the requirements of the statute, then it is out of line with practically all the other courts upon the subject, including this one, and can not be sustained by either logic or reason. In the first place, such holding is in direct conflict with the express language of the statute requiring one year's residence in this state by plaintiff before the suit will be maintained, which the Hall case, *supra*, and others have construed to mean "actual" residence. Furthermore, it ignores the underlying principle of the rule requiring residence of the plaintiff within the jurisdiction of the forum in order to grant the divorce. That rule is, that one state or country will not entertain a suit by one for the purpose of affecting his status when he is a citizen

of another state or country; that no such change of status will be decreed except to citizens of this state. The observance of this principle seems to govern practically all the courts in assuming or denying jurisdiction in divorce cases.

In the Peterson case, *supra*, as in all the others referred to, except the Beckett case, the parties resided in this state at the time of the separation and when the grounds of divorce occurred. The opinion cites in support of the conclusion reached by the court the Cummings case, which in turn, as we have seen, was based upon the Boring case. It is therefore manifest that the court in the Peterson case intended to adopt the principles of the Boring and Cummings cases and not to depart therefrom, although the facts in that case were not so clear or convincing as to the temporary absence of the wife as they were in the other cases. In none of the cases relied on and considered above (except the Beckett case, where jurisdiction was not assumed) was the wife a non-resident of the state at the time of filing the suit, and also at the time of the separation and the commission of the acts complained of and had ever been, as is true in the instant case.

Supporting our conclusion that the court properly dismissed plaintiff's suit in so far as it sought a divorce because of the absence of jurisdiction, is the case of Hulette v. Hulette, 80 Ky. 364. In that case the opinion says: "She had not been a resident for one year next preceding the institution of the action, and the action for a divorce must necessarily be dismissed."

The second reason above for the court not assuming jurisdiction for the purpose of granting a divorce is equally well taken. The act of abandonment on the part of the husband occurred in Michigan and it has continued in that state from the time he walked away. Under precisely the same facts this court held in the Beckett case, as we have seen, that the cause of divorce (which was the same as here) occurred in the foreign jurisdiction, and plaintiff was neither a resident of this state at the time, nor did she allege that it was a cause of divorce in that jurisdiction, which is also true here. We therefore conclude that the judgment in so far as it denied the divorce prayed for was properly rendered.

The remaining question is, whether the Pike circuit court had jurisdiction of the action for the purpose of ad-

judging alimony in favor of plaintiff? That a suit for that purpose may be maintained without being combined with one for a divorce, and before the granting of a divorce, there can be no question. 1 R. C. L., pages 876, 881, 887 and 21 Cyc. 1598, 1603. Section 420 of our Civil Code would seem to recognize the right to maintain separate actions for divorce and for alimony, since it says: "An action for alimony *or* divorce shall be in equity;" while section 422 and 423 deal exclusively with suits for a divorce, and section 424 refers to two distinct causes of action, one for divorce and other for alimony. Independent, however, of the Code provisions this court in the cases of *Butler v. Butler*, 4 Litt. 201; *Lockridge v. Lockridge*, 3 Dana 28; *Hulette v. Hulette*, *supra*; *Shepherd v. Shepherd*, 174 Ky. 615, and *Williamson v. Williamson*, 183 Ky. 435, not only upheld the right of the wife to maintain an independent suit for alimony without asking for a divorce, but furthermore held that such suits are transitory ones, and that it was not necessary for their maintenance that the jurisdictional facts requisite to the maintenance of a divorce suit should exist. The only facts necessary to be shown, in purely an alimony suit, where neither a divorce *a vinculo* nor one *a mensa et thoro* is asked, are that the parties are husband and wife and that he without her fault refuses to maintain her. Indeed the suit is for the purpose of affording a remedy to the wife to require her husband to discharge his legal obligation to furnish her maintenance and support. The result of the suit would not in the least affect the status of either party and, therefore, no question of residence is involved. To hold otherwise would render it possible for derelict husbands to abandon their wives and locate themselves and their property in another state or country, thereby converting the latter into an asylum where they would be immune from supporting their wives until they could establish a residence there, and then, perhaps, to flee that state before the expiration of the time necessary therefor and thereby defeat entirely the fulfillment of their lawfully assumed marital obligations. The same process could be repeated in each state to which the husband might go, and thus the wife would be deprived entirely of her just dues. To prevent any such consequences the right to maintain the action as a transitory one is quite generally, if not everywhere, upheld.

The court should have retained the case on the docket for settling the right of the wife to temporary alimony, and it erred in dismissing the petition absolutely.

Wherefore the judgment is reversed with directions to set aside the order of dismissal and for proceedings consistent with this opinion.

Beck v. Sovereign Camp of the Woodmen of the World.

(Decided March 4, 1921.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Second Division).

1. **Beneficial Associations—False Statement in Application.**—There can be no recovery on a certificate of membership in a fraternal insurance society where the application for membership falsely states that the applicant is not engaged in the liquor business, when the constitution and by-laws of the society provide that one so engaged is ineligible to membership.
2. **Beneficial Associations—Misrepresentation.**—Such a misrepresentation is a material one within the meaning of section 639 Ky. Stats.

HUBBARD & HUBBARD, EUGENE HUBBARD and FRED P. CALDWELL for appellant.

L. D. GREEN and ROBT. L. PAGE for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Affirming.

Upon the faith of a written application theretofore signed by Joseph Beck, on the 28th of February, 1913, there was issued to him by appellee, a fraternal insurance society, a certificate of membership entitling the appellant, his wife, the beneficiary therein, to one thousand dollars if his death should occur after the second year of his membership, and to one hundred dollars in addition thereto to be used by her in erecting a monument over the remains of Joseph Beck.

Joseph Beck died on the 28th of August, 1917, and this is an action by the beneficiary on that certificate.

The only defense made which it is necessary to consider is that Joseph Beck falsely stated in his application for membership that he was neither directly nor indirect-

ly engaged in the occupation of saloon-keeper or bartender, or engaged in the retailing of intoxicating liquors as a beverage; it being alleged that under the constitution and by-laws of the fraternal society persons so engaged should not be admitted to membership, and that because of such false and fraudulent misrepresentation in his application the certificate was issued to him, when otherwise it would not have been.

After hearing all the evidence, the trial court directed a verdict for the defendant, and the plaintiff has appealed.

The evidence is that prior to January, 1913, there was operated at 20th and Magazine streets in Louisville a grocery store and saloon by Mrs. Deddens, and that either in January or February, 1913, as testified to by plaintiff herself, Joseph Beck bought this grocery and saloon from Mrs. Deddens, and soon thereafter made the application to join the fraternal society. The evidence also shows that the city license to operate the saloon which had previously been issued to Mrs. Deddens was on the 13th of March, 1913, transferred to Beck, and that such application for license or transfer had to be made at least thirty days before same would be granted. This evidence is convincing that the application for this transfer had been made by Beck on or before the 13th day of February, 1913, although the exact date is not shown.

This, taken in connection with appellant's own statement that Beck had bought the grocery and saloon before he made application for membership in the fraternal organization, makes it reasonably clear that he was in fact the beneficial owner of the saloon and operating same under his predecessor's license not only on and before the 28th day of February, when this certificate was issued, but on and before the 6th of February, the date of the application for membership.

The question is, is such false answer as to the nature of his occupation or business such a material misrepresentation as will void the certificate?

It was the declared policy of the society, as shown by its constitution and by-laws, to exclude from its membership persons engaged in the business or employment of saloon-keeper or bartender, or in the retailing of intoxicating liquors as a beverage, and Beck falsely stated in his signed application for membership that he was not engaged in such business or occupation.

It is provided in our statute (sec. 639) that no misrepresentation in an application for a policy of insurance "shall . . . unless material or fraudulent, prevent a recovery on the policy."

Not only in this case was the misrepresentation such as to operate as a fraud upon the appellee, because it by express provision in its constitution and by-laws made Beck ineligible to membership, but the misrepresentation was as to a material fact which entered into the risk which the appellee took in issuing the certificate, or at least it was its declared policy that one engaged in the retail liquor business was a bad risk and therefore excluded.

At any rate, the question is not an open one in this state. In the case of National Council, etc. v. Thompson, 153 Ky. 636, it was held by this court that there could be no recovery on such a certificate in a fraternal society where the application falsely stated that the applicant was not engaged in the liquor business when the by-laws provided that such person was ineligible to membership. In that case the applicant was in fact only in the liquor business as the personal representative of his deceased brother's estate and not for his own profit or benefit, and yet it was held there could be no recovery.

The directed verdict by the trial court was proper and the judgment is affirmed.

Consolidation Coal Company v. Gibbs.

(Decided March 4, 1921.)

Appeal from Johnson Circuit Court.

1. Master and Servant—Creation of Relationship.—When an employer retains and exercises the right to direct the manner in which the business shall be done, as well as the result to be accomplished under a contract, it creates the relationship of master and servant.
2. Contracts—Ambiguity.—In the interpretation of ambiguous and uncertain contracts, which have been executed or partially executed, the courts will generally adopt that construction which the parties themselves in operating under the contract have given to it.
3. Master and Servant—Creation of Relationship.—Plaintiff's evidence analyzed, and when taken altogether is declared to have

created the relationship of master and servant and not to have made him an independent contractor as claimed.

E. C. O'REAR, W. G. DEARING, KIRK & KIRK and ALLIE W. YOUNG for appellant.

J. L. HERRINGTON and W. H. VAUGHN & SON for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

The appellee, Gibbs, filed this action against the appellant company, alleging that in January, 1918, he entered into a verbal contract with the defendant through its agent, servant and employe, Queen, whereby the defendant employed him to cut and manufacture into bank props, motor ties and room ties, at certain stipulated prices, all the timber on a certain boundary of land containing about 400 acres, in Johnson county, at or near certain coal mines the defendant was then operating.

He charges that he entered upon a performance of the contract and continued until about the — day of August, 1918, at which time defendant wrongfully, and without right, refused to permit him to complete the same, whereby he was deprived of the additional profit he would have made if he had completed the same, amounting to \$2,500.

The defendant answered, denying the existence of the contract.

Upon a trial the jury returned a verdict of one thousand dollars for the plaintiff, upon which judgment was entered, and the defendant has appealed, insisting that it was entitled to a peremptory instruction.

The difficulty in deciding this question grows out of the uncertain, vague and unsatisfactory nature of the plaintiff's own testimony with reference to the terms of the agreement; for if it may be said that his evidence substantiates the allegations of his petition, the directed verdict was properly refused, but if, on the contrary, it proves a contract different from the one alleged, and under the terms of which the right existed by either party to terminate it, then the peremptory should have gone.

Plaintiff's testimony on this subject, on his main examination, was as follows:

"You may state whether or not you entered into a contract with the Consolidation Coal Co. relative to timbering a boundary of land for ties and props for its mine."

(Defendant objects; the court: He may tell what was said).

I was working on the tippie, and had started to dinner at twelve and Queen called me back and said he wanted me to make posts and I told him I would rather not make posts or ties—it was ties instead of posts—and he says, I will give you a contract, and I told him the timber was frozen hard until I could not do any good, and I says, yonder is as good a timber man as there is, and he says, who is it, and I says, Ezra Salyers, and he said he would give me Ezra Salyers for a buddy, so I saw Ezra and he said he would work, and he worked a while and he quit, said it was too far to walk, he could not work, and I went ahead making ties myself and I sawed them up, got them sawed up with the help of Jay Pack, and we were sitting there and I saw Queen coming up, and I says, there is something up the way he is riding, and he rode up—Herb Queen—and says, what about making some posts? and I says, I have nobody to help saw, and he says, what about that fellow you have with you, Pack? and I said he did not want to work in the woods, and Queen says, in case of an emergency he can work any place we want him, and about that time I took the contract of making posts and he gave me these other four hollows.”

Again, on his main examination, he testified, in answer to questions, as follows:

“Was an agreement made for cutting all post timber on this boundary of land at the time the agreement was entered into about cutting the tie timber on the land?”

(Defendant objects; the court overruled the objection, to which defendant excepts.)

Well, we took the contract to make posts just after I got the boundary of ties. I first made ties and then he told me he wanted me to make posts of it.

Was anything said between you and Mr. Queen relative to whether or not you were to cut all of the timber on this boundary of land into cross ties and bank props?

(Defendant objects; the court overruled the objection, to which defendant excepts.)

I was to cut everything but the locust.

Who said that?

Herb Queen.”

Thereafter, in the summer of 1918, a new superintendent of some of the mines, Wolfe, was named, and Gibbs had a conversation with Queen wherein he told Gibbs to

report to Wolfe, and as to that Gibbs, on his main examination, testified as follows:

"When was that with reference to your arrangement with Mr. Herb Queen when you were assigned the four hollows?

"A right smart bit after; I think it must have been the last of June or first of August when Mr. Wolfe came in as general super.

"When you had the conversation with him relative to this contract, you may state where it was and who was present."

(Defendant objects; the court overruled the objection, to which defendant excepts.)

"We were at No. 3 barn and he told me the evening before, Queen did, that I would have to go to Wolfe next morning; that he was general super over me; so me and Jay Pack went up next morning and I asked Mr. Wolfe if he wanted me to go ahead and make ties, and he says, yes, he wanted me to go on and make ties; that he did not want to be any more this winter like they had been.

"State all the conversation between you and Mr. Wolfe relative to this arrangement.

"I went ahead and worked on and got the tie timber about worked out where we could get to for the truck patches and patches of corn where the people had their gardens in, and I went to him and said I was up against it about some ties to make; said the truck patches and patches of corn cut us out, and he says, go ahead and make what you can without destroying the people's stuff and when you get that worked out, I will give you another contract, a bigger one and better one."

Again, in testifying about a conversation between him and Wolfe, he says, on his main examination, that Wolfe told him to get out whatever he could at the place he was working, "and when I got out what I could he would put me in another territory."

Again, he says that Queen told him to work on Possum Hollow "and moved me from there to Sorghum."

He again testified that he said to Wolfe, after Wolfe had become superintendent that "there was one thing I would like to ask of him and I told him Mr. Queen had never allowed me to hire any men, and that I would like to hire some men; that I could not do any good with just my buddy and myself, and he said, you can hire all the men you want. The timber is what we want, and we want the yard stocked."

He testified on cross-examination, that at the time of his first conversation with Queen he was working on the jin crew for the company, and that the members of that crew did all kinds of work, any kind that they were told to do; that Queen first put him to work in Possum Hollow and then afterwards directed him at different times to work in other places; that Queen did not tell him how many ties he wanted, but he said he wanted "some several;" that if they told him to go from one hollow to another, he would go there, and that he worked in first one place and then another as he was directed; that the company had five mines and they went where they were directed to go as the most convenient place to get out timber for the particular mine; that he made ties, and the number of ties where he was told to, and delivered them where he was directed, and quit making them when he was told to quit.

It will be observed from this evidence of the plaintiff that at the beginning he was given only one "hollow" in which to work, and that thereafter, when he was put to making posts, "he gave me those other four hollows;" but he never says in his testimony that he was to have the exclusive contract to take off the tie and post timber from the four hundred acres, but, in response to a flagrantly leading question from his own counsel, to wit:

"Was anything said between you and Mr. Queen relative to whether or not you were to cut all of the timber on this boundary of land into cross ties and bank props?" he answered:

"I was to cut everything but the locust."

The question is, does not this vague, indefinite and evasive statement by the plaintiff of the terms of the contract, when interpreted in connection with the whole of his testimony, show not only that he did not have the contract set out in the petition but that he in fact had a totally different one?

He says that in the first talk with Queen only cross ties were mentioned, and that Queen refused to permit him to have more than one man work with him in the getting out of ties. This refusal of Queen at the very inception of the contract is most convincing that Gibbs was not thereby made an independent contractor, and that he was not then given the contract which he alleges, for if he had been given such contract and had been made an independent contractor, neither Queen nor any other officer of the

company would have had or exercised the right to control him as to the number of men he should put on the job.

Then again, if Gibbs had been an independent contractor he would not, as he has testified he did, have asked Wolfe whether he wanted him to continue to make ties. If he had the contract to take off all the timber he would not have been subject to the orders and directions of the officials of the company as to when and where he should work and how many ties he should get out at certain places and how many men he might or might not work.

Interpreting all this evidence of the plaintiff in connection with his hesitant and vague statements with reference to the terms of the agreement with Queen, it becomes reasonably clear that neither he nor Queen at the time intended to make Gibbs an independent contractor for the purpose of making the timber on the whole 400 acres into ties and props; but that, on the contrary, it was in their minds that appellee was merely being taken from one branch of appellant's service and placed in another branch where he was given a better opportunity to make money, but that his new work was to remain under the orders and directions of appellant's officers.

When an employer retains and exercises the right to direct the manner in which the business shall be done, as well as the result to be accomplished, the contract creates the relationship of master and servant. 26 Cyc. p. 966; 18 R. C. L. 490; *Robinson v. Webb*, 11 Bush 464.

In the interpretation of ambiguous and uncertain contracts which have been executed, or partially executed, there is no safer plan than to adopt that construction which the parties themselves in operating under the contract have given to it.

Applying these rules to the analysis of the plaintiff's evidence which we have undertaken the plaintiff's own evidence not only fails to establish the contract which he has alleged but, in fact, establishes a different contract which creates the relationship of master and servant, which either party might terminate at any time.

It follows from what we have said that the motion for directed verdict should have been sustained.

The judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent herewith.

Sellards, et al. v. Adams, et al.

(Decided March 4, 1921.)

Appeal from Magoffin Circuit Court.

1. **Vendor and Purchaser—Action for Fraud and Deceit.**—A vendee of land, who has been induced to purchase it, by false representations as to the title, knowingly made by the vendor, with the intention to deceive and to induce the purchase, and suffers injury thereby, may maintain an action for damages for the fraud and deceit, and in such action may recover all his actual damages.
2. **Vendor and Purchaser—Action for Fraud and Deceit.**—In an action brought by a vendee against the vendor for damages because of actual fraud practiced upon him by the vendor, in inducement of the sale, as false representations knowingly made with reference to the title, with the intention to deceive, and in reliance upon which the purchase was made, the insolvency or non-residence of the vendor does not have any effect.
3. **Vendor and Purchaser—Action for Fraud and Deceit.**—Although a vendee has received a deed, which contains covenants of warranty, covering the defects in the title complained of, he may maintain an action of deceit for the damages suffered by him, on account of an actual fraud perpetrated by the vendor upon him in inducing the purchase of the property.
4. **Vendor and Purchaser—Breach of Covenant.**—If one relies upon the covenants in his deed, he must be confined to such recovery as is permitted for a breach of such covenants, and the necessary facts must exist to sustain a cause of action for such breaches.

J. W. HOWARD for appellants.

PRATER & RAMEY for appellees.

**OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.**

The appellants, Floyd and Ella Sellards, by a petition in equity, averred, that they purchased a tract of land from the appellees, John A. and Ellen Adams, paying one-half of the purchase price and for the balance, executing their two promissory notes, and which by the direction of John A. Adams, were made payable to the appellee, Harlan Roark. The Adams conveyed the land to the Sellards by a deed containing a covenant of general warranty, and put them into the possession of the land. They, further, averred, that to induce them to buy the land, pay the cash payment, execute the notes, and accept the deed, John A. Adams, falsely and fraudulently repre-

sented to them, that appellee's title to the land was perfect and that they owned the minerals, including oil and gas, in the land, as well as the surface, and being deceived by the representations of Adams and relying upon them, they purchased the land as above stated and accepted the deed, which they would not have done if they had known, what they have since learned, that appellees, at that time, had no title at all to the minerals, including the oil and gas, in the land. The minerals had long theretofore been sold and conveyed to another, and that, although, appellee, John A. Adams knew such to be a fact, he falsely and with intention to defraud them, represented that appellees were the owners of same and fraudulently concealed the fact, that appellees did not have and could not make appellants, a title thereto; that the minerals, including oil and gas in the land and the privilege of mining for same, constituted one-half the value of the land, and that they had agreed to purchase the land, pay the cash payment, execute the note and accepted the deed fully believing that they were acquiring a title to the entire land, and that by reason of the fraud perpetrated upon them, as above stated, they had suffered damages in the sum of \$300.00; that Roark, the holder of the notes was a non-resident of the state of Kentucky and resides in the state of Ohio. The prayer of the petition was for a cancellation of the notes, which the appellants had executed to Roark, which would relieve them of the payment of one-half of the purchase price, and for a recovery of \$300.00 in damages against the other two appellees. A general demurrer was offered to the petition by the Adams, and sustained, and the Sellards, declining to plead further, their petition was dismissed, and hence this appeal.

The appellee, Roark, being a non-resident and not having been brought before the trial court, in a way, that a personal judgment for relief of any kind, could be rendered against him, and for the same reason not being before this court, upon the appeal, no consideration will be given to the appeal as to him, and it is dismissed.

The appellees, John A. Adams and Ellen Adams, are husband and wife, and in making the sale, the former was presumably acting as the agent of the latter, as they appear as joint vendors of the lands. The appellants took the depositions of several witnesses, but, we do not regard it necessary to consider same, since, if the petition did not state a cause of action against any of the appel-

lees the evidence on file would not entitle the appellants to a recovery, and, if the petition was sufficient, there being no answer thereto, the appellants were entitled to recover without any proof of the averments of their petition, and hence the only question for consideration is, whether the petition contained a statement of facts sufficient to constitute a cause of action against the Adams. The petition contains a statement of facts, to the effect, that appellants purchased a tract of land, and paid and obligated themselves to pay therefor, believing that they were receiving a fee simple title thereto, when in truth and in fact, they were receiving a title to the surface of the land and to such further parts of it, as did not consist of any kind of minerals therein, and in addition the surface of the land might be subjected to the necessary operations of mining by the owners of the minerals in the land, and that while they were put into possession of the estate of which the minerals consisted, by virtue of the terms of section 2366a, Ky. Stats., their possession was only for the benefit of the owner of the minerals, in which they had not received any beneficial interest, but, held them in the nature of a trustee. They were, as alleged, induced by the false and fraudulent representations of appellees to purchase the land, without which they would not have done so, and these representations were made to deceive and defraud them, by appellees, who were pretending to sell and deliver the title and possession to them, of something of which the appellees were not the owners and could not vest them with any beneficial possession. It could not be contended, that this did not work an injury to appellants, who to secure the ownership of the property, which they had purchased and paid appellees for, would be compelled to purchase and pay the real owners therefor. The cause of action stated in the petition against the Adams is not an action for damages for breach of the covenants of warranty of title contained in the deed, which appellees made to the land, as insisted by their counsel. That when negotiations between parties for the sale and purchase of lands are consummated and a deed is executed and delivered, the transaction so far as it rests in contract is merged in the writing, there is no doubt, but that false and fraudulent representations made by the parties to induce the transaction are not so merged, and hence, the representations and actions of the parties in the negotiations for a sale and purchase of land when made in good faith, although they may be

false, when the transaction is consummated, the representations and actions are merged in the purchase, but if the representations were known to be false when made and have caused injury to the adverse party, the consummation of the contract, will not shield the wrongdoer. *Culvers v. Avery*, 7 Wend. 380. The foregoing doctrine is upheld, in that long line of decisions, in this jurisdiction, which hold, that where a contract for the sale of land has been fully executed, and there is no other ground for complaint on the part of the vendee, except a defect of the title, he can not maintain an action for the rescission of the contract, unless there was actual fraud, in the sale, otherwise, he is relegated for relief to the covenants in his deed. *Buford v. Guthrie*, 14 Bush 695; *Simpson v. Hawkins*, 1 Dana 305; *Vance v. Hank*, 5 B. M. 537; *Duvall v. Parker*, 2 Duv. 182; *Campbell v. Whittingham*, 7 J. J. M. 100; *Miller v. Long*, 3 Marsh, 336; *Upshaw v. Debow*, 7 Bush 442; *Madden v. Leak*, 5 J. J. M. 95. That other line of cases, which hold that in the absence of fraud, insolvency or non-residence of the vendor, that a vendee, in possession under a deed containing covenants of general warranty, can not have a rescission of the contract, when sued for the purchase money, although the vendor, at the time of the sale, may have represented his title to be perfect, when it was not in fact, and in such case the vendee will be required to pay the purchase money, and rely upon the covenant of warranty, if an eviction should befall him, rest upon the same principle. *Gale v. Commonwealth*, 3 J. J. M. 538; *Taylor v. Lyon*, 2 Dana 276; *Trumbo v. Lockridge*, 4 Bush 415; *English v. Thomasson*, 82 Ky. 280. It will be observed, that none of the above cited cases confines a vendee to a reliance alone for recoupment upon the covenants of warranty in his deed, when the sale and purchase were the result of fraud practiced by the vendor. Where the purchase of the land is the result of false representations as to the title of the land, knowingly made by the vendor with the purpose to deceive and to induce the purchase, and relied upon by the vendee, and the sale is induced thereby, and therefore not constructively, but, actually fraudulent, and the vendee suffers injury therefrom, he may maintain an action against the vendor for the damages suffered on account of fraud and deceit, or he may maintain an action for a rescission of the contract, if he acts promptly, when the fraud is discovered. While the greater number of the decisions of this court, in such states of case, have dealt

with the right to maintain actions for rescission, and the incidents of such actions, the right to maintain the action for deceit is nearly universally upheld, although there is some authority to the contrary. *Perkins v. Rice*, Litt. Select Cas. 218; 7 R. C. L. 1132; 27 R. C. L. 379; *Hunt v. Barker*, 22 R. I. 18; *Meade v. Buin*, 32 N. Y. 280; *Culver v. Avery*, 7 Wend. 380; *Bryant v. Boothe*, 30 Ala. 311; 7 R. C. L. 1166; *Phillips v. Reichert*, 17 Ind. 120; *Schackelford v. Hundley*, 1 A. K. M. 496; *Young v. Hopkins*, 6 T. B. M. 19; *Breckinridge v. Moore*, 3 B. M. 629; *Fristoe v. Laytham*, 18 K. L. R. 157; *Meeks v. Garner*, 93 Ala. 17; *Fitzhugh v. Davis*, 46 Ark. 337; *Anderson v. Buch*, 66 Iowa 490; *Short v. Carroll*, 100 Mich. 418; *Riley v. Bell*, 120 Iowa, 618. Such of the foregoing cases as deal with efforts to rescind sales of real estate nearly all declare the right of a vendee, deceived by actual fraud, to maintain an action for deceit, and the right to maintain an action for rescission on account of fraud practiced in the sale can be rested upon no principle, except that a vendee is not confined to his covenants for recoupment of losses, when the sale is tainted with fraud. The fact, that a vendee holds under a deed containing covenants of warranty covering the defects complained of, does not preclude him from the right to maintain an action for damages for deceit and fraud, where he has been induced by such to purchase the land, and suffers an injury therefrom, 12 R. C. L. 411, and cases cited in Note 1, thereto. Furthermore, although the title to land may be ascertained by an examination of the public records, a failure of a vendee to examine such records does not preclude him from maintaining an action for deceit against a vendor, who knowingly misrepresents the condition of the title to him, and he in ignorance of the title relies upon the representations to his damage. *David v. Park*, 103 Mass. 501; *Dodge v. Pole*, 93 Ind. 481; *Tyner v. Colter*, 67 Wis. 482; *Campbell v. Whittingham*, 5 J. J. M. 96.

The appellees insist that the demurrer was properly sustained because an action for breach of the covenants of warranty in a deed can not be maintained, until there has been an eviction of the vendee either actually or constructively, unless the vendor is insolvent or a non-resident of the state, and the opinion relied upon as sustaining that doctrine, *Walker v. Robinson*, 163 Ky. 614, does sustain it, and with its conclusions we do not quarrel, but, it will be observed, that was an action purely upon the covenants of title contained in the deed, and for a breach

of the contract set forth in the covenants, and not as this action is for the injury suffered by the fraudulent representations made to induce the purchase of the land, and relied upon by the vendee to his hurt. This is an action of tort, and that was an action in contract. That opinion is not different from the many others of this court cited by us, wherein the only complaint was a mere defect in the title, and the sale and purchase untainted with actual fraud in its procurement. Counsel do not draw the distinction between, where a defrauded vendee elects to retain what he has received, and institutes an action for the damages which he has sustained on account of the fraud and deceit by which he was caused to make the transaction and an action for breach of the warranties and ignores his right to make such an election. If a vendee relies upon the covenants of warranty in his deed, at all, he must confine himself altogether to such remedy, and the necessary facts must exist to enable him to maintain such an action, *Phillips v. Reichert*, *supra*, but, he has an election and may sue for the tort caused by the fraud where such exists, and in such action the insolvency and non-residence of the vendor do not affect the right of recovery. The measure of damages allowable in the two actions is different, as when, he sues for the fraud and deceit, if he succeeds in sustaining his action by the evidence, he may recover for all the actual damages sustained, while in an action for a breach of the covenants of warranty, he is confined to the recovery of such damages as the rules of law provide for such contractual breaches, and which are unnecessary to be stated here. Hence, being of the opinion, that the petition contains a statement of facts, which constitute a cause of action, in favor of appellants against the appellees, the Adams; the sustaining of the demurrer was error.

The judgment is reversed, and cause remanded with directions to set aside the judgment, and for other proper proceedings not inconsistent with this opinion.

Mathis v. Martin.

(Decided October 1, 1920.)

Appeal from Spencer Circuit Court.

1. Auctions and Auctioneers—Conduct and Validity of Sale.—An auctioneer is the agent of both parties to the sale, and a memor-

andum thereof signed by him at the proper time, if otherwise complete, is sufficient to charge both the vendor and purchaser under the statute of frauds.

2. Auctions and Auctioneers—Authority of Auctioneer.—Where an auctioneer has full authority to advertise the property and to make all the necessary arrangements for carrying the sale into effect, his authority to bind the vendor does not end with the sale but extends beyond it, and until it is revoked he may properly bind the vendor by a memorandum signed within a reasonable time, but he has no authority to bind the purchaser unless he signs the memorandum contemporaneously with, or immediately after, the sale.
3. Auctions and Auctioneers—Memorandum of Auctioneer.—An auctioneer's memorandum of the sale of land, made on the next day after the sale, though binding on the vendor, is not binding on the purchaser unless he accepts the memorandum or otherwise assents to the sale.
4. Auctions and Auctioneers—Memorandum of Auctioneer.—Where there was an issue as to whether the auctioneer selling land had properly made and signed a memorandum of the sale, the discovery of the auctioneer's book containing the signed memorandum is such newly discovered evidence as required the court to grant a new trial therefor and it was error to overrule the motion based upon that ground.
5. Contracts—Agreement to Release—Consideration.—A release or rescission of a duly executed contract for the sale of land must be supported by a valid consideration in order for the court to enforce the unexecuted releasing or rescinding contract. And if the agreement to release or rescind does not relieve the vendor of any obligations he assumed in the contract of sale, nor confer any benefit upon him, it is unilateral and so far as the vendor is concerned it is without consideration and not binding upon him.

J. W. CRUME and L. W. ROSS for appellant.

BARRICKMAN & KALTENBACKER for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

Appellant and plaintiff below, H. C. Mathis, on October 2, 1916, offered for sale at public auction in Taylorsville, Ky., his farm containing about 275 acres, at which sale the appellee and defendant below, Minor Martin, became the purchaser at the price of \$8,482.50. He declined to comply with the terms of the sale and another was had on the 6th of November following, when the farm brought only \$6,635.69. This suit was filed by plaintiff to recover the difference in the amount of the two bids, together with the cost of advertising the second sale, mak-

ing a total sum of \$1,936.62. The answer consisted only of denials of the averments in the petition. A trial resulted in a verdict and judgment in favor of the plaintiff, which judgment was reversed by this court in an opinion reported in 184 Ky. 20. After the filing of the mandate in the court below a second trial resulted in a verdict for defendant, upon which judgment was rendered dismissing plaintiff's petition, and from this latter judgment plaintiff appeals, urging principally as grounds for reversal (1). that the court erred in not setting aside the verdict upon the ground of newly discovered evidence which consisted of the book containing the auctioneer's signed memorandum evidencing the sale to defendant and which memorandum was dated October 2, 1916; (2) error of the court in allowing defendant to file an amended answer after all the evidence was introduced on the second trial over the objections of plaintiff, and (3) in giving to the jury instruction No. 3, based upon matters alleged in the amended answer.

The law of the case, upon the facts presented at the first trial, is fully discussed and stated by this court in its opinion rendered on the former appeal. It was there held in substance that an auctioneer is the agent of both parties in making a sale like this, and that a memorandum of the sale of real estate made by the auctioneer and signed by him during the existence of his agency will be a sufficient compliance with the statute of frauds and binding upon both parties to the contract. But, in order for his signed memorandum to have this effect it must be made while he is yet agent and if the auctioneer is employed only to cry the bids and strike the bargain his authority ceases when the bargain is struck, except that he has the authority "of making his work effectual by signing the memorandum necessary to bind the parties," but that same should be done "substantially contemporaneous with the sale and as a part of it." It was found by this court on the first appeal that "there was no evidence that the memorandum in the auctioneer's book was signed by him immediately after the sale," but that it was signed on the next day after defendant had repudiated his bid, to which he had not before legally given his assent through his agent, the auctioneer. The book containing the signed memorandum of the sale was not produced upon either trial because of its becoming misplaced and the parties being unable to find it. Two days after the second

trial, and after the motion for a new trial had been overruled, the book containing the signed memorandum was found. Whereupon, the order overruling the motion was at the instance of plaintiff, set aside and he was permitted to rely upon the additional ground of newly discovered evidence consisting of the book containing the memorandum, but the motion as amended was afterward overruled. There is no question of diligence involved, and we think the discovered evidence was of such a nature as to authorize the granting of a new trial, but since the judgment must be reversed for another reason, we will not further discuss that question.

The amended answer, which was filed on November 7, 1919, two years, nine months and two days after the original answer was filed, introduces for the first time matter which if it constituted a valid defense was one entirely new and foreign to any theretofore made in the case. With the omission of the caption, prayer and signature, it says:

“That on the same afternoon of the sale on October 2, 1916, at which this defendant was the highest bidder, it was agreed between plaintiff and defendant that this plaintiff should on the next day go and look at the farm referred, and if he was not satisfied with the farm at the price bid, he had the right to refuse to take it, and he did go and look at the farm on the next day and immediately on the same day refused to take it.”

It will thus be seen that defendant seeks, under this amendment, to escape liability upon the ground that by agreement between the parties, made and entered into after the contract of sale became binding (provided the memorandum of the sale had been signed by the auctioneer), he was released from its obligations and that the contract was at his option alone to be cancelled and rescinded and that he exercised his option within the stipulated time and thereby became released from the contract. Waiving the timeliness of the offered amendment, and conceding for argument only that an executory contract for the sale of land, which the statute of frauds requires to be in writing, may be cancelled or rescinded by another executory oral contract (a proposition which is not determined), the vice in the supposed defense consists in the absence of a consideration to support the agreement relied on. Such independent agreements, as

the one here involved, are themselves contracts and must be supported by a valid consideration, as is required in all other contracts. 39 Cyc. 1357, and 6 R. C. L. 916-917. It may be true that in such executory rescinding or releasing contracts "the mutual obligations assumed by the parties at the time of the modification (release, or rescission) constitute a sufficient consideration." (R. C. L. *supra* 918). Still, we have no such assumption of mutual obligations in this case. According to defendant's allegation, he assumed no obligation in the oral release agreement relied on. The entire fruits of it were to inure to his benefit alone, the plaintiff obtaining none of them and obtaining no release from any of his obligations under the executory contract of sale by the auctioneer. Neither did the defendant, under its terms, assume any obligation or release any right growing out of his purchase at the auctioneer's sale, and, as said in the citation last referred to, "if one of the parties does not assume any obligation or release any right a promise by the other is a *nudum pactum* and void." The same publication on page 917 further says: "An agreement by one person to discharge another from the obligations of a written contract as a matter purely *ex gratia* and in the nature of a donation, would be of no binding validity as a mere executory agreement." A different question would arise if the agreement relied on in the amended answer had been *executed* and the parties placed in the same position they were before a sale of the land. Such question, however, is not presented under the facts of this case. On the contrary, defendant is seeking to shield himself behind the terms of the agreement pleaded in the amended answer and to thereby *enforce* its execution so as to release him from the obligations he assumed as purchaser at the auction sale. Under the law relating to contracts, as above shown, he can not be permitted to do so, nor have we been able to find any other principle or rule of law authorizing the court to sustain this defense.

The court erred therefore in permitting defendant to file the amended answer complained of, and upon a return of the case it will set aside the judgment and sustain the motion for a new trial and set aside the order filing the amended answer and sustain plaintiff's objections thereto. This conclusion renders it unnecessary to discuss the propriety of instruction number 3, complained of, since it submitted the issue presented by the wrongfully

filed amended answer. Nor is it necessary to determine the sufficiency of the evidence to sustain the verdict and that question is left open.

Wherefore the judgment is reversed with directions to proceed as herein indicated.

Humphreys v. Central Kentucky Natural Gas Company.

(Decided November 30, 1920.)

Appeal from Montgomery Circuit Court.

1. **Gas—Companies Operating Under Franchise from City—Duty of Under Contract.**—If a gas company or public service corporation is occupying the streets of a city under a franchise contract its duties and liabilities will be determined by the terms of the contract if the contract contains provisions respecting its duties.
2. **Gas—Companies Operating Under Franchise from City—Implied Contract to Supply Gas.**—Where a gas company obtained a franchise from a city to use its streets for the purpose of supplying its people with natural gas and the contract between the city and the gas company did not provide how much gas in quantity or pressure should be furnished to customers, the law will imply a contract on its part to exercise reasonable and practicable diligence and care to supply customers with a sufficient quantity and pressure of gas.
3. **Gas—Liability of Company to Consumer Under Implied Contract.**—Where a gas company is furnishing gas under a franchise from a city and there is no contract with the consumer or the city as to the quantity or pressure to be furnished the consumer may bring a suit against it on the implied contract it was under to perform the services for which it sought and obtained the franchise, and in such action may recover damages for loss suffered through its negligence and failure to fulfill its implied obligation.
4. **Gas—Duty and Liability to Consumer Under Implied Contract.**—Where a gas company furnishing natural gas for heating purposes under a franchise granted by a city fails to furnish the consumer with the requisite quantity or pressure of gas needed in his home or his business and injury or loss results therefrom the consumer may have an action against the company for damages.
5. **Gas—Duty and Liability of Company Under Implied Contract—Notice of Failure to Furnish Gas.**—Where a gas company is under an implied duty to furnish gas to a consumer and it fails to fulfill its implied duty the gas company must have notice of the failure or it cannot be made liable in an action brought by the

consumer to recover damages for loss sustained on account of failure.

R. A. CHILES and JOHN G. WINN for appellant.

W. B. WHITE and HAZELRIGG & HAZELRIGG for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Reversing.

In 1904, the city of Mount Sterling enacted an ordinance providing for the sale of a natural gas franchise permitting the purchaser to "construct, maintain and operate in the city of Mount Sterling, Ky., and over and along and under the streets and public ways thereof a gas plant for the purpose of providing the said city and its inhabitants, customers and consumers with natural gas to be used for the purpose of giving heat, power, light and fuel to said city, its inhabitants, customers and consumers, at such prices as may be hereafter agreed upon by such customers, consumers, city and its inhabitants." . . . "And the owner of such franchise, right and privilege shall have the right to dig ditches to lay their pipes and mains in the streets of said city, erect all necessary appliances and machinery for the purpose of operating said plant."

Pursuant to this ordinance the franchise was sold to C. C. Chenalt, the predecessor in title of the appellee, the Central Kentucky Natural Gas Company. The franchise contract between the city and Chenalt provided, "that there is let and granted and this ordinance does hereby let and grant to the purchaser of the natural gas franchise herein before referred to, the right, privilege and permission to construct, lay, operate, and maintain through and in the streets, avenues, alleys and public places of the city of Mt. Sterling, Ky., a system of pipes for the conveyance, distribution and sale of natural gas for heating, fuel and manufacturing power purposes for the full term of twenty (20) years from the time this ordinance shall take effect." . . . "Said purchaser of this franchise shall not charge during the life of this ordinance a maximum rate to exceed forty (40) cents per one thousand (1000) cubic feet of gas and said purchaser shall allow a discount of ten (10) per cent. on all gas furnished to the city buildings, public schools, parochial schools, the city hospitals, public libraries and churches from the net rate charged the consumers of gas in said city, using it for heating buildings in similar manner."

It will be observed that this franchise contract does no more than grant to the purchaser the privilege of constructing and maintaining in the city a system of pipes and other appliances for the conveyance and distribution of natural gas to the people of the city and fix a maximum rate that may be charged for the service. It does not prescribe the quantity of gas or the amount of pressure that shall be furnished or fix any liability for a failure, arising from any cause, to furnish the quantity or pressure that may be needed by any consumer or class of consumers.

In short the franchise contract with the city did not by its terms impose any duty on the company in consideration of the privilege granted or oblige it to furnish gas in any quantity to any person.

Shortly after the contract was made, the gas company laid its pipes and mains in the city and commenced to supply the people of the city with gas and was so engaged in 1914-1918. During these years the appellant, Humphreys, was a florist in Mt. Sterling, and kept a large stock of growing plants and cut flowers for sale; the buildings used in the conduct of his business were equipped to be heated by burning natural gas and he was a regular customer of the company receiving natural gas from its pipes for the purpose of heating his green house and appurtenant buildings and paying for it the price charged, and except for the time hereinafter mentioned it did supply him with all the gas needed.

In this suit to recover damages for the loss of plants caused by the failure of the company to furnish an adequate quantity of gas and pressure he alleged that it was necessary to protect his plants in cold weather that there should always be maintained in his buildings a temperature not lower than thirty-six degrees F.; that on or about December 10, 1917, and for the space of ten days the company failed to supply gas either in quantity or pressure that would furnish a temperature as high as thirty-six degrees or any temperature above twenty degrees although he used all the gas that was supplied to him; that he kept his heaters and other apparatus in good order and exercised care and diligence to prevent his plants from being injured by the cold on account of the failure of the gas supply but was unable to do so or to procure other means of heating his buildings, and as a result of the fail-

ure of the needed gas supply his plants and flowers of the value of \$710.00 were frozen and rendered worthless.

He further averred that his buildings were so constructed and so equipped with heating apparatus that the required temperature during this period and at all times could have been maintained if the company had furnished the requisite supply of gas.

He further alleged that the nature of his business and the necessity of maintaining a temperature of 36 degrees was known to the company when it accepted him as a customer and at all times thereafter; that he relied on the company to furnish the requisite heat and it had been doing so until the time mentioned, when it failed to do so, and he was unable to procure any other means of heating his buildings; that with knowledge of the quantity of gas and pressure needed and the condition and character of his building it made connection with said buildings and the pipes and apparatus therein contained and between them and its main pipes and began and undertook to furnish him sufficient gas and sufficient pressure to maintain such temperature and it therefore became and continued to be its duty so to do; that it failed and refused to comply with its undertaking and wrongfully, unlawfully, carelessly and negligently failed to perform its duty of furnishing the requisite quantity of gas; that the only reason why the temperature fell below 36 degrees was on account of the negligent and careless failure of the company to furnish the necessary gas at proper pressure.

To the petition as amended a general demurrer was sustained and Humphreys appeals.

The franchise contract between the city and the gas company did not, as we have said, oblige the gas company to furnish Humphreys or any person any specified quantity of gas or such quantity as would maintain any degree of temperature. It is also admitted that Humphreys did not have any contract with the company by which it undertook to furnish him any quantity of gas or to maintain any specified temperature or any temperature. Therefore Humphreys, having no special contract, was not able to find in the franchise contract any express condition or provision on which to base his cause of action.

It is, however, insisted in his behalf that when the company obtained the privilege of supplying the city and its inhabitants, including himself, with natural gas for heating purposes and began to do this under its franchise

contract it thereby assumed an implied and enforceable obligation to furnish him the necessary quantity of gas to maintain such temperature as would protect his plants from freezing, in view of the fact, as alleged, that it knew the degree of heat that would be necessary to protect his plants and that he was depending entirely on the heat that could be supplied by the burning gas.

On the other hand, it is contended by counsel for the gas company that its liability in cases like this rests entirely on express contract, and there being no contract requiring it to furnish any specified quantity of gas or pressure or to maintain any specified degree of heat in any building it can not be made liable if it fails to do so. It is further contended that even if it could be held liable on the implied contract asserted, its liability in such a state of case could only arise after notice to it that Humphreys was not receiving the required quantity or pressure of gas, and the failure to aver the giving of such notice was fatal to the petition.

Coming now to consider these respective contentions our opinion is that if there had been an express contract between the city and the company specifying the quantity and pressure of gas that should be furnished to the people of the city, or such a contract between the company and Humphreys the rights and liabilities of the parties would be controlled by the terms and conditions of the contract, and if the company had failed to fulfill the terms of the contract and in consequence thereof Humphreys had suffered the damages complained of, there could be no doubt of his right to recover under the authority of *Paducah Lumber Co. v. Paducah Supply Co.*, 89 Ky. 340; *Graves v. Logan*, 112 Ky. 775; *Lexington Mfg. Co. v. Ots*, 119 Ky. 598; *Kenton Water Co. v. Glenn*, 141 Ky. 529; *Tobin v. Frankfort Water Company*, 158 Ky. 348.

In these cases it was held that when a water company entered into a contract with the city to construct and operate a system of water works for the purpose of supplying the city and its inhabitants with water and undertook in the contract to equip its plant with specified water fixtures and appliances and to maintain a described quantity and pressure of water it could be held liable at the suit of any inhabitant of the city who suffered loss on account of the failure to comply with the terms of the contract.

It was further held in these cases that the contract with the city was for the use and benefit of the inhabitants as well as the city, and therefore any inhabitant who had sustained damages by a breach of the contract with the city could bring an action against the company in his own name, and there is no place for a distinction between the duty and liability of a water company and a gas company when each is operating under a like franchise contract. In each instance the company is engaged in the performance of a public duty and answerable to any city customer damaged by a breach of it.

It will, however, be observed that in the cases mentioned there was an express contract prescribing the duties of the water companies, while in this case there is no express contract prescribing the quality or quantity of service the gas company should render.

But in the absence of an express contract of the character mentioned, we think the company may be made liable in an action for damages at the instance of any customer who has suffered loss through its negligence or failure to fulfill the obligations impliedly assumed by its solicitation and acceptance of the franchise contract with the city under which it acquired the right to and did use the streets for the purpose of supplying the city and its people with gas for heating purposes.

When a public service corporation such as a gas company obtains the privilege of occupying and using the streets for a particular public service that will be beneficial to the people of the city and there is no express contract between it and the city defining its duties and obligations, the law will raise an implied and enforceable contract to take the place of the omitted express contract and impose on the company the obligation to render the service that was reasonably within the contemplation of the parties when the contract was made.

It is a familiar and well established principle in the law of contracts that when a contract intended to create mutual rights and obligations is entered into and the contract does not specify the duties and obligations intended to be assumed by one of the parties the law will imply a contract on his part to do and perform those things that according to reason and justice he should do to carry out the purpose for which the contract was made, and the nature of such a contract will be gathered from the facts and circumstances surrounding the parties at the time the contract was entered into. Numerous cases

declaring the principle stated will be found in "Words and Phrases" under the head of "Implied Contracts;" in 6 R. C. L., p. 586; 13 Corpus Juris, 640; Chitty on Contracts, vol. 1, p. 15; Elliott on Contracts, vol. 2, sec. 1355.

We are further of the opinion that when the law raises in a case like this an implied contract any inhabitant of the city will have the right to maintain an action in his own name for a breach of it to the same full extent that he might maintain an action for the breach of an express contract. The principle that would give a citizen of the city a cause of action on an express contract is equally applicable to an implied contract. No distinction can be drawn between the duty of the company to perform the obligations put on it by an implied contract and its duties and obligations under an express contract.

There might, however, be a difference in the nature and quality of the duties arising under an express contract and those arising under an implied contract. In the case of an express contract the terms and conditions of the contract itself must be looked to while in the case of an implied contract the conditions to be performed would be only those that in reason and justice the company should perform in carrying out the purposes for which the privilege to it was granted, and these we will presently undertake to define in a general way.

It can not be doubted that when this gas company applied for and was granted the right to use the streets and public ways of the city for the purpose of supplying the people in their homes, factories, offices and places of business with natural gas for heating purposes and began the performance of this service it engaged and undertook to continue the service in such a manner as would reasonably and naturally fulfill the expectations in the minds of the contracting parties when the franchise was granted and accepted, and perform this service in such a manner as was reasonably intended by it and the city when the contract was entered into.

Accordingly we think that when this gas company obtained a franchise from the city to use the streets and public ways for the purpose of supplying the people of the city with natural gas and entered upon the performance of this service it thereby assumed an obligation to exercise reasonable and practical care and diligence, considering all the existing circumstances and conditions, to supply its customers with such quantity and pressure of

gas as their needs, when known to it, might require, and this without discrimination or favor.

The company will not be heard to say that because there was no contract prescribing its duty it may do as it pleases in the performance of the service undertaken by it, and that if it is negligent or careless in the performance of what it has undertaken to do neither the city nor any of its inhabitants will have any actionable complaint against it.

To require a less measure of duty than we have defined would be unjust to the city and its people and enable a gas company to defeat the very purpose that induced the city to grant the privilege of using and occupying its streets for the purpose of furnishing gas for heating purposes. It would also subject to great inconvenience, discomfort and expense the inhabitants of the city, who acting on the reasonable belief that the company would render the contemplated service, had removed other means of providing heat and installed in their homes, factories and places of business the fixtures and appliances necessary to secure heat from the new source of supply.

To secure for itself and its people means of obtaining heat was the only reason why the franchise was granted by the city, and there would be many times a gross failure to render the service contemplated if the gas company might use its own convenience or pleasure in determining the quality of its service.

We do not of course mean to say that a gas company is under an absolute duty to furnish each or any of its customers the precise quantity of gas or the exact pressure needed by them, because it might not be reasonable or practicable for it to do this without discrimination, but if it knows the needs of a particular customer and the quantity and pressure of gas he requires in his business it should furnish this quantity and pressure if by reasonable and practicable diligence and care under all the existing circumstances and conditions it can do so without discrimination against other customers. Public service corporations can not give to particular customers special favors to the detriment of others. They must treat all customers alike.

The exact character of service that will meet the measure of care and diligence we have laid down can not, of course, be stated with accuracy. It must depend on the facts and circumstances of each case as it comes up. It

is, however, certain that when the failure of a gas company to furnish the needed service is caused by its negligence or carelessness, as the petition charges, it has not exercised the required degree of care and diligence.

The views expressed and the rules laid down in this case as to the duty and liability a public service company is under when there is no express contract with the city or the consumer are not harsh or unreasonable or beyond the ability of the gas company to carry out if it in good faith intends to meet the obligations it assumed when it accepted the franchise.

There is a dearth of authority on the subject of the implied duties of a public service corporation, and this is so because there is usually a contract between such corporation and the city prescribing and defining the things it shall do and the manner in which they shall be done. There are, however, a few cases that support in a general way what we have said.

In *Coy v. Indianapolis Gas Company*, — Ind. —, 36 L. R. A. 525, the question was whether the gas company should be made to respond in damages to Coy, one of its customers, for its failure to furnish his dwelling house with sufficient heat to keep it comfortably warm during cold weather. In his petition, to which a demurrer was sustained and the petition dismissed, Coy alleged that the company had obtained a franchise from the town in which he lived to furnish the people of the town with gas for heating purposes, and had also entered into a written contract with him to supply sufficient gas to comfortably heat his residence; that it failed to do this, and as a consequence two of his children were made sick and died. Thereupon, he brought suit for damages against the company.

In the course of the opinion the court, after setting out the duty the company owed under its contract with Coy, further said that this agreement

“Did not in any manner absolve appellee from the duty assumed under its franchise, but rather by its terms fixed the character and scope of the duty so assumed. Even without and before the contract, it was the duty of the company to attach its mains to appellant’s house pipe, on being requested to do so by him, and on his compliance with the reasonable conditions imposed by the company. Nor would it be enough to make such connections without supplying the gas therefor. Not a partial, but a full,

compliance with the company's duty is required, and this without any discrimination as to persons having a right to the gas. *Central U. Teleph. Co. v. Fehring (Ind.)*, 45 N. E. 64. Whether, particularly after contract entered into to supply the gas, the company might be relieved of the obligation to furnish it, by reason of inability to procure the gas, or for other reason, we need not decide, as no such question appears in the record. That would be a matter of defense, and can not be taken into account in determining the sufficiency of the complaint."

In *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S., 57, 50 L. ed. 367, the Supreme Court of the United States, in considering the liability of a water company operating in a city under a franchise to a suit for damages for failing to supply a sufficient quantity of water to extinguish a fire that destroyed the property of a citizen of the city, said in answer to the contention of the water company that independently of its contract with the city it was under no duty to furnish an adequate supply of water to the people of the city, that:

"It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may be also true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other personal arrangements for a supply of water, then the company owes a duty to them in discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty and recovery may be had for such neglect. . . .

"An individual may be under no obligation to do a particular thing, and his failure to act creates no liability; but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for

instance, may be under no obligation, in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumed likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. Holmes, *Common Law*, p. 278. Even if the water company was under no contract obligations to construct water works in the city or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care; and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort, and not for a breach of contract."

The court in these cases also held that the right of action was in tort, not contract, but this is not so material because the principal question is: will an action lie? Our court has ruled in the water cases, *supra*, that the action is for breach of contract, while other courts say that such an action is in tort. But in this case the damages, if any, to which Humphreys is entitled are easily ascertainable, and there can be no objection to proceeding against the company for a breach of its implied contract. If a case should come up in which the damages were not susceptible of reasonable estimation, as, for example, in a suit like the one brought by Coy, an action for tort might be brought.

It is further insisted by the company that the petition is fatally defective in failing to charge that it had notice of the fact that Humphreys was not receiving the quantity and pressure of gas needed. In this behalf the argument is made that it should not, in the absence of such notice, be made liable in damages, because with notice of the conditions at Humphreys' place of business it might have made arrangements to save his plants from injury and loss.

We agree with counsel in the contention that if a customer of a gas company is not receiving at his home or place of business the quantity or pressure of gas that is needed to prevent loss or damage in his home or his place of business, he should give notice to the company of the facts so that it may have opportunity to relieve the trouble, and if he fails to do this, the company can

not be made liable in damages for its failure to furnish a sufficient supply or pressure.

Where hundreds and in many cases thousands of customers are receiving gas in homes, factories and places of business for heating purposes, and the conditions surrounding each place to be heated are different in one or more respects, as is usually the case, it would be very unreasonable to hold the company liable for damages one of them might suffer on account of an inadequate supply or pressure of gas until it had actual notice of the facts. But we do not think an allegation as to notice indispensable to the sufficiency of the petition. It is a matter of defense.

Wherefore the judgment is reversed, with directions to overrule the demurrer to the petition as amended and for proceedings not inconsistent with this opinion.

Louisville & Interurban Railroad Company v. Roberts.

Same v. Same.

(Decided December 17, 1920.)

Appeals from Oldham Circuit Court.

1. **Carriers—Action By Passenger for Injury—Instructions.**—In a suit to recover damages by a passenger against a carrier for an injury inflicted by a jerk of the train or car, the plaintiff must both allege and prove, not only that the jerk was sudden, unusual and unnecessary, but in addition thereto that it was of such violence as to indicate negligence on the part of the carrier, and an instruction which does not embody all these elements is improper.
2. **Appeal and Error—Instructions.**—An error of the court in giving or refusing to give instructions, unless relied on in the motion and reasons for a new trial will on appeal be considered as waived.
3. **New Trial—Newly Discovered Evidence.**—A new trial will not ordinarily be granted for newly discovered evidence, the only purpose of which is to contradict a witness who testified in the case; nor will a new trial be granted on that ground unless the party moving therefor exercises due and proper diligence to discover and produce the testimony at the trial.
4. **New Trial—Carriers—Knowledge of Agent.**—An agent of a common carrier whose duty it was to investigate the facts relating to an accident is a representative of the carrier and his knowl-

edge concerning a statement made by a witness who testified upon the trial contrary thereto is the knowledge of the carrier, and a new trial will not be granted on the ground that defendant's attorneys discovered the existence of the contradictory statement after the trial, since the carrier is presumed to have had knowledge of it and should have produced it on the trial.

WILLIS, TODD & BOND and STRAUS, LEE & KRIEGER for appellant.

ROBT. T. CROWE, WILLIAM J. CROWE and JAMES A. SPEED for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing the first case and affirming the second one.

The first case above is an appeal from a judgment in favor of appellee and plaintiff below, William C. Roberts, against the appellant and defendant below, Louisville & Interurban Railroad Company, for the sum of \$3,166.00, which plaintiff recovered in a suit brought by him to obtain damages for personal injuries he sustained on May 7, 1917, and which it is averred were produced by defendant's negligence. The second appeal is from a judgment denying a new trial in a suit brought for that purpose by the defendant in the first case, after the first trial, upon the ground of newly discovered evidence.

Plaintiff was a passenger on one of defendant's cars running on Broadway in the city of Louisville, Kentucky, and the substance of his allegations in his petition is that as the car approached the intersection of Twelfth street with Broadway, he, desiring to leave the car at that place, and under the advice of the servants and employees of defendant, started to leave it and when he reached the steps preparatory to making his exit there was an unusual, unnecessary and violent jerk of the car which threw him upon the street with such force as that he sustained his injuries, and that the jerk and sudden start of the car (being of the nature described) was the result of gross carelessness and negligence of the servants in charge of and operating it. The answer denied the negligence and in a second paragraph pleaded contributory negligence, which was controverted of record, thus completing the issues. The chief grounds relied on in this court for a reversal of the judgment in the original or first case above are: (1) erroneous instruction given over defendant's objections, and (2) misconduct of plaintiff's counsel in the examination of witnesses.

Before taking up either of these grounds we deem it proper to make a brief statement of the facts. Plaintiff lived at La Grange and boarded one of defendant's cars in the city of Louisville which he thought ran to his home but it proved to be one going in the opposite direction. After passing Tenth street on Broadway in the city the conductor on the car discovered the mistake and notified plaintiff that he could leave the car at Twelfth street and take a city car back to defendant's station, where he could take one for his home. Plaintiff's testimony as to what then occurred is: "I said, 'I will get off and walk back again,' I said 'All right,' he slowed down, I got up and got my grip and got on the step, and the man gave the car a lurch and threw me." He said that the place where he fell was between sixty and seventy feet from Twelfth street, but this was merely his opinion, and his injuries rendered him unconscious so that he could make no observations after the accident, but the uncontradicted testimony of the witnesses for both sides is that the place where plaintiff fell was something like the middle of the square between Eleventh and Twelfth streets. The car in which plaintiff was riding was partitioned, one compartment being for white passengers and the other for colored passengers, and on this trip the colored compartment was in the rear and it was from the rear end that plaintiff fell. The conductor and two other witnesses who were passengers state (and their testimony on this point is uncontradicted), that plaintiff took his seat at the rear of the white compartment and next to the colored compartment and that the conductor on discovering that he was on the wrong car informed him that he could get off at the next corner (Twelfth street) and get a city car back to Third street, where he could take one for his home; that plaintiff, in both his actions and words, appeared to be intoxicated. The conductor then testified that: "At that time I was making change for one of my passengers, a Mr. McCampbell or Campbell, and this man (plaintiff) got up and started back; I was just giving him his change and I said, 'I better go back after that fellow, he is drunk,' and I started right back after him, and just about the time he got to the rear platform to step off—the car was still moving—I grabbed at him and got hold of his coat like this (indicating), but he was a man that I guess weighed over two hundred pounds and with that hold I didn't have sufficient hold to hold him,

but I hollered at him and grabbed him and he stepped off the car with his face toward the rear of the car—just deliberately stepped off that way, and he held to the handhold with his right hand and he had his grip in his left hand, and that throwed him back—of course, naturally pulled him back.” The testimony of the conductor, in the quoted portion of his testimony, is substantially corroborated by Mr. Campbell and Mr. Weller, both of whom were passengers in the car. The motorman knew nothing about the accident until after it happened and he stopped his car practically at Twelfth street. All of the witnesses for defendant, including the passengers on the car, testified that there was no jerk or lurching of it as testified to by plaintiff.

Turning now to the grounds urged for a reversal, the court gave to the jury five instructions and under ground (1) complaint is made chiefly of instruction number one, which, with number two, were the only ones touching the merits of the case, since numbers three, four and five related to the measure of damages and defined ordinary care and negligence and against which no objections could be urged. Instruction number one says:

“If the jury believe from the evidence that plaintiff exercised ordinary care for his own safety in leaving the car and in taking a position upon the steps thereof, and while standing in that position, that he was thrown from the car by an unusual and unnecessary jerk of the car and injured the law is for the plaintiff and the jury should so find.”

This instruction is erroneous in at least two particulars. It did not even attempt to define the duty which defendant owed to plaintiff as a passenger and it permitted a recovery for only “an unusual and unnecessary jerk of the car,” and left it for the jury to conjecture what was a negligent, unusual or unnecessary jerk. In the cases of *Louisville Railway Company v. Wilder*, 143 Ky. 436, *Wilder v. Louisville Railway Company*, 157 Ky. 17, *Louisville Railway Company v. Osborne*, 157 Ky. 341, *South Covington & Cincinnati Street Railway Company v. Trowbridge*, 163 Ky. 79, and *Louisville Railway Company v. Osborne*, 171 Ky. 348, this court held that to entitle a passenger to recover for injuries produced by a jerk or lurch of the car, assuming that the passenger was at a place on the car that he had a right to be under the facts of the particular case, the jerk must not only be un-

necessary and unusual but it must be "of sufficient violence as to indicate negligence in the operation of the car." In the Trowbridge case the rule is thus stated:

"The rule in this state is that the passenger who is injured by reason of a jerk or lurch of the conveyance may not recover therefor unless the jerk or lurch was unusual, unnecessary and of such violence as to indicate a want of the required care in the operation of the conveyance. *Louisville Railway Company v. Osborne*, 157 Ky. 341."

And in the *Osborne* case, referred to in the quotation, in stating the rule the opinion says:

"It is not sufficient to constitute negligence in law that there may be an unusual movement of the car or a sudden jerk of the car. An unusual movement, under some circumstances, might be entirely necessary in the prudent operation of the car, and so when the charge is that the movement was unusual, it should also appear that it was unnecessary, and when it is both unusual and unnecessary and of sufficient violence to cause injury to a passenger, the jury may infer that the injury was caused by negligence in the operation of the car."

On the second appeal of the *Osborne* case (171 Ky. 348) all prior cases from this court are referred to and approved, and the cases referred to and relied on by appellee's counsel do not assert a different doctrine. On the contrary a close reading of them will show that the rule as announced in the cases above referred to is fully recognized. As said in the *Osborne* case (157 Ky. 341), a jerk or a lurch of a car might in strictness be unnecessary, or both unnecessary and unusual, but unless it is of sufficient violence as to constitute negligence on the part of the carrier it will furnish no cause of action to the passenger for injuries thereby sustained.

Under ground (2) urged for a reversal, objection is made to a number of very glaringly leading questions propounded to plaintiff by his attorney, and it must be admitted that this objection is not without reason to support it. Some of the questions objected to are about as leading in their form as could well be, but since a reversal must be ordered for other reasons we will not further elaborate this ground.

The defendant at the close of the testimony moved the court to instruct the jury peremptorily in its favor, which motion was overruled and to which ruling exceptions

were taken. It will be observed that this is not (under the proof) a case where an accident occurred at or near a regular stopping place of the car, or at a place where those in charge of it agreed to stop it, and it therefore is not governed by the rule permitting a passenger to recover for an injury sustained at such places under similar facts. Rather it is one where according to the testimony, the passenger, upon his own volition, attempted to alight from the car away from the stopping place and practically in the middle of the square. It is true that this court in the case of Paducah Traction Co. v. Tolar, 162 Ky. 50, sustained the plaintiff's right to recover for injuries inflicted when she attempted to alight from the car while it was moving at a point about midway between regular stopping places, but the plaintiff in that case testified in substance that the conductor knew her purpose was to get off at that particular place and that the car was running so smoothly that she thought it was stopped. Furthermore, the evidence showed that the conductor knew, not only that the car was running rapidly, but that the purpose of the plaintiff therein was to then alight therefrom, and he made no effort whatever to prevent her from doing so. We therein held that while it was not the duty of the conductor or those in charge of the car, under the circumstances, to exercise any care to discover that a passenger was about to alight, but if they did know of the fact the duty was imposed upon them to make reasonable effort to prevent the passenger from getting off, and if they fail to do so and by reason thereof the passenger was injured, the carrier would be held liable. It was said in that opinion, however, that: "On the other hand, if, as stated by the conductor, he did not know her (plaintiff's) purpose, or have opportunity to arrest her action, the company was not guilty of any negligence, and there should, and doubtless would, have been a verdict in its favor had the jury accepted the conductor's story of the accident." In this case no one contradicts the conductor's testimony as to the place, way, and manner that plaintiff attempted to alight from the car, nor does any one contradict his testimony concerning the efforts he made to prevent plaintiff from doing so. But, whether such controlling facts, which permitted a recovery in the Tolar case, are present or absent in this one, we will not now determine. Since the refusal of the court to sustain the motion for the per-

emptory instruction was not relied on in the motion for a new trial. Miller's Appellate Practice, section 55; Alexander v. Humber, 86 Ky. 569; Sehon v. Whitt, 29 Ky. L. R. 691; Finley v. Curd, 22 Ky. L. R. 1912, and Davis v. Moore, *idem* 261.

The alleged newly discovered evidence as grounds for a new trial relied on in the petition in the second case is a written statement made by one of defendant's witnesses shortly after the accident to the claim agent of defendant, who at the time was engaged in investigating the facts relative thereto. In that statement the witness said that he did not see the accident. On the trial of the case that witness testified that he saw the accident while he was standing on the street nearby and corroborated plaintiff in some of his testimony, particularly as to the jerk or lurch of the car. In the petition for a new trial it was alleged that the claim agent who took the statement from the witness was not present at the trial, and that neither the attorney nor any one representing defendant knew of the existence of the written statement. We are clearly of the opinion that the petition did not manifest sufficient ground for a new trial. In the first place, the alleged newly discovered evidence is contradictory only and impeaching in its effect, and hence, of a character for which a new trial is not ordinarily granted; and in the second place, it can not be said that due diligence to produce it at the trial was shown, since it was the duty of the defendant in the exercise of reasonable diligence to both know of the existence of the statement and produce it on the trial. The claim agent of defendant who procured the written statement from the witness was no less its representative for the purpose of preparing the case for trial than was defendant's attorney who conducted the trial, and defendant must be charged with the knowledge of its procurement, and can not be permitted to say that it did not know of its existence, which is the only matter relied on as newly discovered evidence.

Wherefore the judgment in the first case is reversed and the judgment in the second one is affirmed.

Baskett, By, &c. v. R. H. Crossfield and Transylvania University.

(Decided December 17, 1920.)

Appeal from Henderson Circuit Court.

1. Libel and Slander—Matters of Defense—Privilege.—A letter containing matter of a defamatory nature, written by the president of a school to the parent of a pupil in the school informing the parent why the student had been dismissed from the institution and relating the facts and circumstances under which he was dismissed, is a privileged communication, and neither the school nor the president of the institution is liable to the pupil in damages for libel, if the letter was written in good faith with the proper motive and based upon reasonable or probable cause.
2. Libel and Slander—Privilege—Malice—Presumption.—A qualifiedly privileged communication is one where the circumstances are such as to preclude any presumption of malice, but if it affirmatively appear that the communicator was guilty of either falsehood or malice he is liable in damages.

HENSON & TAYLOR and VANCE & HEILBRONNER for appellants.

YEAMAN & YEAMAN and JOHN C. WORSHAM for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Transylvania University is a co-educational institution regularly incorporated, with a board of trustees, located at Lexington, Kentucky, and R. H. Crossfield is and has been for several years its president. Appellant, Oscar R. Baskett, matriculated as a student in the university in September, 1918, and with another young man from Henderson was assigned to a room on the second floor of a boys' dormitory on the campus, facing one of the principal thoroughfares of the city of Lexington. One or more windows of the room looked out upon the street. About two weeks after the arrival of young Baskett at the university complaint was made to President Crossfield that he (Baskett) had and was then indecently exposing his person at the open window of his room in such way as persons traveling the street saw his nude form and were embarrassed thereby. Some of the college faculty immediately set about to investigate the charge and on entering Baskett's room found him in an absolutely nude condition with the window shades partly up. Baskett

was directed to report at the office of President Crossfield, which he did within a short time thereafter, and an investigation was had resulting in President Crossfield suggesting to young Baskett that he immediately withdraw from the school and leave on the afternoon train for his home in Henderson. Baskett called up his mother over the telephone and told her that he was leaving the school because some women had reported that he had been exposing his person; thereupon his mother called up a member of the faculty of the university to inquire the reason of the exclusion of her son. That day President Crossfield wrote the father of Baskett a letter. It was dated October 1st. A further investigation being later made Crossfield again wrote the father another letter dated October 4th, and these two letters are the basis of an action against the university and President Crossfield to recover damages for libel. They read as follows:

“Transylvania College,
Lexington, Ky.

Office of the President,
October 1, 1918.

Dear Mr. Baskett:

I am greatly grieved to be put to the necessity of asking your son to withdraw from our campus. It is always a source of great distress to us to have a case of any sort of discipline. The object of the institution is to train men rather than discipline them, but sometimes situations arise that make it impossible for a student to remain upon the campus.

The report came to me yesterday morning that your son had been observed by a number of people indecently exposing himself from the window of his room. I think there can be no sort of question as to the act. I was perfectly sure of my ground before I called the boy into my office. He denied the act very strongly. However, in order to save mortification to him, and possibly arrest, for feeling was running pretty high against him, both on the part of students and others, I told him he should withdraw at once. Our treasurer refunded him the money that he paid with the exception of the proportionate amount for the two weeks. I instructed him to see Mrs. Perkins, and to have her refund the board money he had not used.

Assuring you of the deep humiliation that it causes me to be compelled to write you in this fashion, and hoping the boy may take this as a serious lesson for all of his life, and develop into useful manhood, I am,

Sincerely yours,
R. H. Crossfield.

Mr. Thomas Baskett,
724 Center Street,
Henderson, Ky."

"Transylvania College,
Lexington, Ky.
Office of the President,
October 4, 1918.

Dear Mr. Baskett:

Mr. Hall, of your community, came to see me night before last, and he and I talked over the situation, with respect to your son, at length. I told him just how we felt about the whole matter; that it was a source of the greatest measure of pain and sorrow to us to be compelled to advise a young man to return to his home, and that we undertook to act in the place of a parent to all those who come to us for instruction. I told Mr. Hall that I would come home, further investigate the case, and report the results. I said to him that the evidence that your son was guilty of most serious misconduct was overwhelming, and that the charge that he had exposed himself from his room window was positive and thoroughly confirmed. I told him that one of the professors of the college, who was in charge of the dormitory, and the inspector of the dormitory went to the room of your son, and found him lying upon the bed in an entirely nude condition, the curtains being sufficiently raised to allow him to be seen from the street. I said, furthermore, that women, not members of the college community, who claimed that they had seen your son in a nude condition on Sunday and Monday morning, were so indignant that it was not really wise for your boy to remain on the campus, and that my advice to him to go home was as much an act of kindness to him as a matter of discipline.

I have returned from Richmond, and have gone into the case again. I am very sorry to state that a second investigation seems to make the case against your boy more damaging than the first investigation. Under no circumstances would he be permitted to live in the dormitory, and Professor Kuykendall would not in any way ad-

wise that he be permitted to board out in town. Every one of us feels that it would not be wise for the boy to return, and that his denying the statement attested by so many witnesses makes him an utterly impossible student for our student body.

I told Mr. Hall that had the boy manifested any sense of shame and mortification and penitence there would have been no question about his having a second chance, but that coupled with the offense was his utter disclaimer, and that the kind thing to do under the circumstances was not to make it a matter of faculty action, nor to allow the police to take hold of it, but to advise the young man in the strongest terms to withdraw immediately from the campus and from the city.

I am exceedingly sorry, both on the young man's account and that of his mother. We were in no wise responsible for the occurrence, and feel that the least severe discipline possible has been administered. Had this been brought before the faculty, his expulsion would have been practically certain. Had it gotten to the officers of the law, his arrest would have been certain.

I regret more than I can tell you to be put under the necessity of writing you the above statement, but after going into the matter this morning I find that the evidence is even more damaging than the statements as they came to me last Monday.

It is my sincerest hope that the young man will learn the lesson that he may develop into a useful and successful man of the highest type. We shall want to help him whenever possible.

Cordially yours,
R. H. Crossfield.

Mr. Thos. Baskett,
724 Center Street,
Henderson, Ky."

The answer contained a plea averring (1) the truth of the statements contained in the two letters; (2) a statement of facts showing the communications privileged. On a trial the jury returned a verdict for the university and found for the plaintiff, Baskett, the sum of \$100 against the defendant and appellee, Crossfield. The case was tried in the Henderson circuit court, and the appeal by Baskett is from that court. Crossfield prosecutes a cross-appeal.

Without reviewing the evidence at great length it will be sufficient to say that there was such conflict in it as would have warranted the trial court in submitting the case to the jury on the question of whether the young man did or did not indecently expose his person from a window of his room. But we have, for reasons hereinafter pointed out, reached the conclusion that the judgment must be affirmed.

The gist of an action for libel is the injury to the character. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424.

A writing is libelous if it subjects the person referred to to odium or ridicule or tends to subject him to obliquy. *Kentucky Journal Pub. Co. v. Brock*, 140 Ky. 373.

To render words actionable, unless special damages are shown, they must import that the person of whom they are spoken is guilty of a felony, or some crime of such turpitude as to render him liable on an indictment. *Tharp v. Nolan*, 119 Ky. 870.

In an action for libel the truth is always a complete defense, although the publication may be inspired by malice or an ill-will and be libelous *per se*. *Herald Publishing Company v. Feltner*, 158 Ky. 35.

If a communication come within the class denominated absolutely privileged or qualifiedly privileged, no recovery can be had. Privileged communications are divided and defined as follows:

“(1) That the communication was made by the defendant in good faith, without malice, not voluntarily, but in answer to an inquiry, and in the reasonable protection of his own interest or performance of a duty to society; (2) that the defendant must honestly believe the communication to be true; (3) there must have been reasonable or probable grounds known to him for the suspicion; (4) that the communication, if made in answer to an inquiry, must not go further than to truly state the facts upon which the suspicion was grounded, and to satisfy the inquirer that there were reasons for the suspicion.” Under that definition, not only must the communication be made in good faith, without malice, upon reasonable grounds and in answer to an inquiry, but in addition thereto it must be made by the defendant either in the protection of his own interest or the performance of a duty to society. *Felty v. Felty*, 164 Ky. 335.

A privileged communication has been defined as one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or probable cause. In such cases there is no *prima facie* presumption of malice from the publication. There must be some evidence beyond the mere fact of publication. *Browning v. Commonwealth*, 116 Ky. 286.

A qualifiedly privileged communication takes place when the circumstances are held to preclude any presumptions of malice but still leave the party responsible for both falsehood and malice if affirmatively shown.

Where a party makes a communication and such a communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. 25 Cyc. 385; *Sullivan v. Strahorn-Button-Evans Commission Co. (Mo.)*, 47 L. R. A. 859; *Nix v. Caldwell*, 81 Ky. 293; *Baker v. Clark*, 186 Ky. 816.

The sole inquiry necessary for us to consider on this appeal is were the two letters of which complaint is made privileged or qualifiedly privileged communications? If they were, no action for libel is maintainable by Baskett; if they were not, or if the letters were only qualifiedly privileged and there was actual malice on the part of President Crossfield, then the defendants were liable.

What was the duty of President Crossfield to the father of young Baskett under all the circumstances as they existed on October 1st and 4th, 1918, at the date of the writing of the two letters? The president of the school was *in loco parentis* to young Baskett as a student. There was a relation of trust and confidence between the two and between the president of the school and the father of the pupil; and the president of the school being in charge of the student body owed a duty to the father and family of young Baskett, which he could not discharge except by faithfully, fully and accurately reporting to the father and family the progress and deportment of the student. In the performance of this duty the president of the university had the right to act, write and say of and concerning the dismissed student what a reasonably prudent and considerate official of a college would under like circumstances have done and said. If he had done and said less than is shown by the letters he would have been remiss in duty; if he had done more he would have subject-

ed himself to the charge of being actuated by malice. In this case Dr. Crossfield appears to have done only what his duty required of him. He gently and rather apologetically wrote and sent to the father of the student the two letters of which complaint is made. That these letters were written in the utmost good faith and for the good of the father and the dismissed student is beyond cavil. There is a total absence of evidence tending in the slightest degree to show malice on the part of President Crossfield towards young Baskett or his father. They were not even acquainted, and the president did not know the boy by sight, for he had only been in the school two weeks, and there was a large number of students in attendance at the school. Under the state of pleadings—the answer pleading privileged communications—the burden was upon the plaintiff, Baskett, to show actual malice on the part of President Crossfield and the university, which he was unable to do. In so failing he surrendered his right of recovery and the trial court should have sustained both the motion of the university and President Crossfield for a directed verdict in their favor made at the conclusion of all the evidence. Had President Crossfield, after hearing the complaint against young Baskett and the evidence in support thereof, failed to communicate these facts to the father of young Baskett he would not have been worthy of the presidency of a great educational institution. Having acted in the line of his duty both to the school and community, young Baskett and his father, he as well as the university is blameless and no recovery can be had by Baskett. President Crossfield has entered a motion in this court for a cross-appeal, but he can not have such relief in a common law action unless he had filed motion and grounds for a new trial, in the court below.

For the reasons indicated the judgment is affirmed.
Judgment affirmed.

Rowland, et al. v Lilly's Heirs, et al.

(Decided February 4, 1921.)

Appeal from Lee Circuit Court.

1. Deeds—Construction.—While there is a distinction in the technical meaning of the words "reservation" and "exception" as used in

deeds, no matter which word is used the deed will be given that meaning which it is manifest from the whole instrument was intended by the parties.

2. Deeds—Reservation Defined.—A reservation is a clause whereby the grantor reserves some new thing to himself out of that which he granted before, and an exception is the exclusion from the conveyance of part of the thing granted which remains in the grantor by virtue of his original title and is a thing in esse at the time.
3. Deeds—Bond for Title.—The provisions of a title bond will be presumed to have been merged into a subsequent conveyance between the same parties of the same land.
4. Deeds—Construction—Exception.—Where a vendor and a vendee are each the owner of a one-half undivided interest in land, and the vendor, in a conveyance to the vendee of his interest therein, "reserves from the aforesaid land all the minerals," it is an exception out of the interest of the vendor of his one-half of the minerals and does not operate to divest the vendee of his one-half undivided interest in the minerals theretofore owned by him.
5. Deeds—Exceptions.—A grantor cannot except out of the operation of his conveyance an interest in the land conveyed to which he has no title, and if he undertakes to do so the exception will be void as to the excess over his existing interest.

HURST & ROSE, CARTER D. STAMPER and CLARENCE E. TYRRE, guardian ad litem, for appellants.

GRANT E. LILLY, KELLY KASH and THEO. B. BLAKEY for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

Prior to the sixth of July, 1907, Mrs. Catherine Lilly and James F. West were the joint owners of two tracts of land in Lee county, each owning an undivided one-half interest therein. On that day Mrs. Lilly conveyed to the said West, "in consideration of the sum of one thousand dollars . . . and the further consideration of the surrender of first party's title bond dated the third day of April, 1901, . . . all of her right, title and interest in and to the following two tracts of land, the said interest being an undivided one-half thereof."

But there is this reservation or exception: "But it is distinctly understood that the first party reserves from the aforesaid land all the minerals, coal, oil, gases and mineral waters, and reserves the right to the ingress and egress to and over the said lands, etc."

On the same day West and wife conveyed the two tracts of land to Williams and others, but in the conveyance the same reservation is made for the benefit of Mrs. Lilly, and in the same language.

This is an equitable action by the heirs of Mrs. Lilly, she having since died, against the vendees of Williams, who claim under West, wherein it is sought to have it adjudged, and the circuit court did adjudge, that the Lilly heirs under the reservation or exception quoted had title to all the mineral in both tracts of land.

That there is a distinction between the technical meaning of the words "reservation" and "exception" as used in deeds is well recognized, but under the rule in this state that deeds will be so construed as to effectuate the intention of the parties as manifested by the language used, it is immaterial whether there is used in the conveyance the word "reservation" or the word "exception," for whichever is used will be given that meaning which it is manifest from the whole instrument was intended by the parties. *Allen v. Henson*, 186 Ky. 201.

In 13 Cyc. 672, a reservation is defined as follows: "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself out of that which he granted before."

In 18 R. C. L., p. 1090, in pointing out the distinction between an exception and a reservation, it is said: "In short, by an exception some part is excluded from the conveyance and remains in the grantor by virtue of his original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance."

An exception, according to 13 Cyc. 672, "is ever of part of the thing granted and of a thing *in esse* at the time. The office of an exception is to take something out of the thing granted that would otherwise pass. A reservation or exception must be something out of the estate granted. The terms reservation and exception are often used interchangeably, and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used."

In R. C. L., volume 8, page 1089, in pointing out the distinction between a reservation and an exception, it is said:

"In general, a reservation, like an exception, is something to be deducted from the thing granted, narrowing

and limiting what would otherwise pass by the general words of grant. Strictly, however, a reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant, while an exception operates to withdraw some part of the thing granted which would otherwise have passed to the grantee under the general description, being a part of the thing granted and something *in esse* at the time of the grant, and the legal effect of the words of exception being merely to sever from that which is granted that which is excepted, so that the latter does not pass by the grant. In short, by an exception some part is excluded from the conveyance and remains in the grantor by virtue of his original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance. An exception is always part of the thing granted, being of the whole of the part excepted; a reservation may be of a right or interest in the particular part which it affects."

Here we have two joint owners, each owning a one-half, undivided interest in fee, dealing with each other as to the subject of their joint ownership. So far as the record shows there had been no contractual relations between them with reference to such joint ownership, except the deed shows that Mrs. Lilly had executed to West on the 3rd day of April, 1901, a title bond presumably involving her interest in this land, but the record is silent as to the contents of that bond, and even if it was here, it must be presumed to have been merged into the subsequent conveyance with which we are dealing. So that we must rely wholly upon the deed and the language used in it, together with the relations the parties occupied toward each other and the land, to reach its correct interpretation.

It is urged for the appellees that although West was only the grantee in the deed and had never conveyed any of his interest in the land to Mrs. Lilly, yet because of the use of the words "the first party reserves from the aforesaid land *all* the minerals, etc.," it will be deemed to have been the contract between the parties and that she was the owner of *all* the mineral rights.

As stated there is no such contract exhibited, and there is nothing in the record from which it might be fairly inferred that there was such an agreement between the

parties, and we must therefore interpret the deed as it is upon its face and in the light of the relations between the parties and of their relation to the land.

It is apparent from the definitions of "reservation" and "exception" above quoted that although the word reservation is used it was in truth an exception; the grantor conveyed an undivided interest in the land and excepted out of that conveyance certain mineral rights.

Being an exception it necessarily follows from the very nature of things that this grantor could not except out of the operation of her conveyance an interest to which she had no title.

Suppose the grantor here had made a deed to some one other than her joint owner, West, and she had therein used the precise language that she used in this deed, is it conceivable that it could have been interpreted as an intent to except out of and appropriate to herself the interest of West in the minerals, and if she had done so, would it not have been void?

Cyc. vol. 13, page 675, says: "An exception is void which is of a thing or right which the grantor does not own; or which is of an estate or interest which has never been in the grantor."

In Shepherd's Touchstone, chapter 5, pages 77, 8, in pointing out the necessary things required to make a valid exception in a conveyance, it is said: "It must be of such a thing as he that doth except may have, and doth properly belong to him." *Pollock v. Cronise*, 12 Howard's Pr. (N. Y.) 363; *Moore v. Lord*, 50 Miss. 229; *Hill v. Cutting*, 107 Mass. 596.

In the latter case John and Philemon Hill were the joint owners of a tract of land which by agreement they divided between them. John Hill in his conveyance to Philemon "reserves for his own use all the wood, timber and trees now standing and being on "a certain described eight acres of the land, retaining the privilege of removing the same. After the division each party entered into the possession of the part conveyed to him, and John Hill thereafter sold the wood in the reservation referred to, to one Cutting. In a controversy arising over it the court, in construing that reservation, said:

"A reservation or exception can only be out of the estate granted, and this clause therefore could not operate by way of reservation or exception upon the undivided half of the eight acres which had never been in the

grantor, but which was before the division and afterwards remained in the grantee. As to the other undivided half, there would seem to be no good reason why the clause should not be allowed to operate strictly as a reservation or exception."

It is conceded that West was vested with the title to a one-half, undivided interest in fee in the land prior to the conveyance by Mrs. Lilly, and we are unable to see how he could have been divested of any interest therein on the face of the deed made to him by Mrs. Lilly for a separate and distinct interest.

It is urged for the appellees that the use of the language "all of the minerals, coal, etc.," by its very terms must have been intended to include all the minerals in the two tracts; but the language is "that the first party reserves from the *aforsaid land* all the minerals, etc.," and necessarily the grantor must have had in mind the *aforsaid land* which she had therein conveyed, meaning a one-half interest in the two tracts.

Any other interpretation would place the grantor in the position of excepting for herself and appropriating to herself an interest which she never owned, and, as we have seen, no such effect can be given to this transaction. We do not believe she had such purpose, but if she had her efforts to that end would have been ineffectual because she could not thereby have divested West of his title to one-half of the minerals.

The judgment is reversed, with directions to enter a judgment as herein indicated.

**Farmers Bank and Trust Company, Administrator of
Fannie S. McAllister, et al. v. Stanley, et al.**

(Decided February 18, 1921.)

Appeal from Henderson Circuit Court.

1. Judgment—Master's Report Not Final Order.—A report of a master commissioner charging the personal representative with a specified item or items, although followed by an order of confirmation, is not a final one for the purpose of appeal where there was no order of distribution of the fund or any adjudication of the rights of any one to any of it, and where those questions were left open for future determination, and especially so where a re-reference of the cause was made to the commissioner.

2. **Appeal and Error—Dismissal of From Order Not Final.**—An appeal from an order which is not final may be dismissed at any time before the appeal is disposed of on its merits, either upon motion of a party, or by the court on its own motion; but if the appeal is not dismissed and the court passes upon the merits of the questions and no corrective motions are made thereafter until the expiration of the time provided therefor by the local practice, the opinion of the appellate court becomes final and conclusive upon the parties and the question as to the finality of the judgment appealed from can not thereafter be controverted, either in the lower court after remand, or by the appellate court on a second appeal from a final judgment.
 3. **Executors and Administrators—Personal Representative Chargeable With Interest.**—A personal representative will not be chargeable with interest upon assets in his hands for two years after his appointment, unless he actually collected interest thereon or could have done so in the exercise of reasonable care; but after two years he will be chargeable with such interest, unless he can show that because of peculiar and uncontrollable circumstances it would be inequitable to charge him therewith.
 4. **Appeal and Error—Judgment Directing Damages.**—After a judgment has been affirmed by the Court of Appeals with damages it is too late on a second appeal of the case to raise the question as to the error in allowing damages, and the judgment of the trial court rendered in obedience to the mandate directing damages will not be disturbed on an appeal therefrom, on the ground that the appellate court should not have directed damages on the first appeal.
 5. **Executors and Administrators—Attorneys' Fees.**—A litigant in settlement suits who employs attorneys and whose services resulted in recovering assets for the estate to the benefit of interested parties, or whose services resulted in defeating claims against the estate, likewise beneficial to the parties, is entitled to a reasonable attorney's fee to be paid out of the trust fund.
- CLAY & CLAY and JOHN C. WORSHAM for appellants.
H. M. STANLEY for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming on the original appeal and reversing in part on the cross appeal.

The appellant, Farmers Bank and Trust Company, was the administrator with the will annexed of Mrs. Fannie S. McAllister, who died a resident of Henderson county. It filed suit in its individual capacity against itself as personal representative, and against H. M. Stanley, on three notes aggregating \$1,700.00 which had been jointly executed to it by its decedent and H. M. Stanley. The latter filed answer, making it a counterclaim and set-off, in which he charged plaintiff as the personal repre-

sentative of decedent (who was his mother) with a devastavit, in that it had failed to possess itself of a diamond brooch that belonged to her and which was worth \$4,000.00, and he sought to charge the personal representative with that sum and prayed for a settlement of the estate. Appropriate pleadings made the issues and the cause was referred to the master commissioner, who reported that the diamond brooch was the property of the decedent and that plaintiff had carelessly and negligently failed to possess itself of it and that it was worth \$4,000.00, which latter fact was reported to be agreed to by the parties. Exceptions were filed to that report by the trust company and upon hearing they were overruled and the report of the commissioner was confirmed, but there was no final distribution or order made in the case. On the contrary, in the order of confirmation there was a re-reference to the commissioner. A short while thereafter the trust company filed a petition for a new trial on the issues as to the value of the brooch and its liability therefor, and alleged that it had obtained the brooch and that it was not worth exceeding \$1,500.00. The lower court granted a new trial, but that judgment on appeal to this court was reversed in an opinion reported in 180 Ky. 705. After the filing of the mandate which issued upon that opinion plaintiff prosecuted an appeal to this court from the original order of confirmation charging it with the brooch at a valuation of \$4,000.00. That judgment was affirmed in an opinion reported in 186 Ky. 836. Reference is made to those two opinions for a more detailed statement of the facts and of the history of the case. The mandate from the last opinion referred to awarded ten per cent. damages and after it was filed in the trial court a final judgment of distribution was rendered in which the trust company was charged with interest on the \$4,000.00 from May 23, 1917, and with \$400.00 damages pursuant to the mandate from this court, and from that judgment it prosecutes this appeal, urging three points for reversal, which are: (1) that it should be charged with only the sum of \$950.00 (being the amount for which the brooch was sold under an order of court made and executed pending the prior appeals) instead of the sum of \$4,000.00 as originally reported by the commissioner and confirmed by the court; (2) error of the court in awarding interest on the \$4,000.00, and (3) error in allowing ten per cent. damages. A cross appeal prosecuted by the appellee and defendant, H. M. Stanley, questions the propriety of the

judgment in certain particulars, only one of which merits consideration and which will be disposed of later in this opinion.

It is doubtful whether ground (1) urged for a reversal is properly before us, since the exceptions filed to the commissioner's report, upon which the judgment appealed from was rendered, do not include the particular error complained of. We have concluded, however, to dispose of the questions raised, as briefly as possible. It is insisted that the order of February 23, 1917 (the one affirmed in 186 Ky. 836), was not a final order from which an appeal could be prosecuted and not being so its affirmance by this court did not change its legal effect or render it conclusive upon the parties or the court. That order only purported to charge the trust company with a particular item to be accounted for by it on final distribution. That such order is not a final one from which an appeal may be prosecuted there can be no question. It has been expressly so held by this court in the cases of *Adkisson v. Dent*, 88 Ky. 628; *Paul v. Wetlauf*, 24 Ky. L. R., 1480; *McClure's Admr. v. Anchor Roller Mills*, 30 Ky. L. R., 509, 99 S. W. R., 221; *Vandever's Admr. v. Richart*, 5 Ky. L. R., 582; *Eubank v. Eubank*, 7 Ky. L. R., 294; *Skillman v. Frost*, 4 Ky. L. R., 621; *Salyer v. Arnett*, 23 Ky. L. R., 321, and *Wooley v. Louisville*, 23 Ky. L. R., 100.

That no appeal may be prosecuted to this court, except from final orders, is too well settled to require reference to the cases, and should an appeal be prosecuted from an interlocutory order it would be promptly dismissed upon motion, or without motion, if the attention of the court should be directed to it. It is furthermore probable that such an appeal, while pending and undisposed of by the appellate court, would not suspend proceedings in the trial court or in any manner affect its authority to proceed with the case as though no appeal was pending. An altogether different result, however, follows the determination of the case on the appeal, and especially so if the judgment is affirmed. In that case the question as to the finality of the judgment appealed from becomes conclusive and the parties may not thereafter question the jurisdiction of the appellate court to entertain and dispose of the appeal, and undoubtedly so, after the expiration of the time for filing a petition for rehearing. This consequence, following the disposition of an appeal from an order which was not final, is sustained by the following opinions and texts, with none to the contrary so far

as we have been able to find: 4 Corpus Juris, 1104 and 1108; Freeman on Judgments, 4th Edition, section 249; 2 R. C. L., 227; Washington Bridge Co. v. Stewart (U. S. Supreme Court) 2 Howard, 413, 11 Lawyers' Edition, 658; Notes to Hastings v. Foxworthy, 34 L. R. A. 334; Grand Central Mining Co. v. Mammoth Mining Co., 36 Utah 364, 104 Pac. 573, 1912A American Annotated Cases; Clary v. Hoagland, 6 Cal. 85; Turner v. Anderson, 260 Mo. 1, 168 S. W. R. 943; Hungurford v. Cushing, 8 Wis. 327; Martin v. Macey, 14 Mont. 85, 35 Pac. 667, and Hall v. Rudd, 13 Ky. L. R. 205, (a Superior Court decision).

In the Washington Bridge Company case, from the United State Supreme Court, and in the Grand Central Mining Company case, the identical question here presented was involved and each of those courts held that after an appellate court had assumed jurisdiction from a non-appealable order (because it was not final), its opinion upon that appeal was conclusive upon the parties as to all questions necessarily determined, including jurisdictional ones, in a subsequent appeal from a final order in the same case. This general rule as applied by the courts and laid down by text writers is thus stated in R. C. L., referred to: "The decision of the prior appeal is conclusive on the second appeal both as to the jurisdiction of the trial court and as to that of the appellate court on the prior appeal. On the second appeal the decision of the appellate court, arising merely from its assuming jurisdiction of the appeal, is conclusive that the order appealed from was appealable and that the court had jurisdiction of the appeal; and, as has been said, to permit afterwards, upon an appeal from proceedings upon the mandate of the appellate court, a suggestion of the want of jurisdiction in the appellate court upon the first appeal, as a sufficient cause for re-examining the judgment, would certainly be a novelty in practice." Indeed it is difficult for us to see, in the light of the rule governing appellate practice, how an opposite view could be upheld. It is fundamental with us (a rule which universally prevails with appellate courts) that an opinion on appeal becomes the law of the case in subsequent trials and subsequent appeals, whether the first opinion was right or wrong, provided, the point involved was expressly or by necessary implication determined upon its merits upon the first appeal. Applying that rule to the instant case it was necessarily determined in the opinion in 186 Ky.

826, as well as in 180 Ky. 705, that the order confirming the commissioner's report of February 23, 1917, in which it was charged with \$4,000.00 as the value of the brooch, was a final one, otherwise the last appeal would not have been entertained, and the first one would have adjudged that the order was final for purposes of a proceeding for a new trial. The exact question has not heretofore been determined by this court, but it was expressly determined in the case of Hall v. Rudd, *supra*, an opinion by Judge Barbour of our former Superior Court. From an interlocutory order referring the cause to the commissioner for an adjustment of accounts between the parties, as to rents and improvements, an appeal was prosecuted to this court which affirmed the judgment, and upon a subsequent appeal to the Superior Court the judgment of this court on the appeal was held to be *res adjudicata* and conclusive upon the rights of the parties, although the first appeal was from an order which was not final. We, therefore, with some reluctance (growing out of the peculiar hardships in this case), conclude that we are bound by the rule of practice as thus established, although its effect is to shut the door to the appealing knocks of justice. It is some consolation, however, for the injustice which is thus visited upon appellant, to remember that there was a time when it had its day in court and when it could have relieved itself of the unjust burden. In all countries with an enlightened jurisprudence there must necessarily be, and is, a formulated set of rules for the guidance of courts in the administration of justice, some of which look exclusively to the dispatch of business to the end that there shall be a final determination of litigation. Without them all disputes and controversies within the cognizance of courts would be forever unsettled, and rights of litigants would be in an interminable state of confusion; hence it is, that the principle of former adjudication has a fixed place in the law. Some court, somewhere, at some time must speak the final word, and we know of none in which the pronouncing of the ultimatum could be more safely reposed than the court of last resort, and when it has assumed jurisdiction and passed upon the merits of the case, and it has passed out of its control, the litigants must abide the result. However harsh the consequences, we can find no way by which we can set at naught the well settled principles of appellate procedure for the purpose of relieving appellant of an onerous situation which, to some extent at least, it has invited. It is better for the

stability of the practice that the fixed and settled rules governing court procedure should be adhered to rather than ignored in order to do justice in a particular case.

We are furthermore convinced that the court did not err in adjudging interest on the \$4,000.00, as complained of in ground (2) urged against the judgment. The former opinions of this court, as we have seen, fixed indisputably the amount for which the administrator should be charged. Nothing back of that may be looked to by us in reviewing the error now under consideration. Those opinions also held that appellant was grossly negligent in not recovering the brooch, or its value, which could have been done as pointed out in those opinions. Our statute (section 3859) says: "A personal representative, after the expiration of two years from the time he qualified, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets." Construing that section, this court in the cases of *Steele v. Louis*, 32 Ky. L. R. 439, and *Howe v. Winn*, 150 Ky. 667, held that the administrator was not chargeable with interest on assets of the estate for two years after his qualification, except such as he actually or could have, by the exercise of ordinary care, realized, and that after that time he is *prima facie* chargeable with interest "and the burden is on him to show that by reason of circumstances beyond his control he was unable, in the exercise of ordinary care, to earn interest on the fund." (*Howe* case). In the *Steele* case the court said: "The statutes require administrators to be charged with interest after two years, on any balance remaining in their hands. There are cases in which administrators should not be charged with interest on such a balance, but the burden rests upon the administrator to show a state of fact to relieve himself from this charge." Other cases found in the notes to the section support those referred to. In this case, assuming that the administrator was rightfully charged with the \$4,000.00 (as we have seen must be done), it has held that sum since February 23, 1917, the day when the commissioner's report charging it therewith was confirmed. The decedent died in April, 1914, and the appointment of appellant as her representative was made in November following. From the time of its appointment it knew of the existence of the brooch and of the contention made that it was an asset of the estate. It chose to take no action in the matter and, in the mean-

time interest was accumulating on claims against the estate, the largest one of which belonged to the administrator. The only act which has prevented the settlement of the estate and the payment of its creditors has been the fight made by appellant against being charged with the value of the brooch. But for its protracted litigation of that single issue the estate would long since have been settled and a considerable sum of accumulated interest on the claims would have been saved. Under the circumstances, in view of the statute and our opinions construing it, we see no room for questioning the judgment in the matter complained of. Moreover, the trial court in the judgment now under review charged appellant with interest on the \$4,000.00 from May 23, 1917, being three months after the master commissioner's report fixing that amount of its liability was confirmed. Our former opinions in this case stamped that order, as we have seen, as a final one, and being so it would draw interest from the date of its rendition.

In disposing of ground (3) relied on for a reversal we find ourselves in the same embarrassed situation as confronted us in disposing of ground (1). It may be assumed that this court erred on the former appeal in awarding damages and directing their collection in its mandate, but its judgment in that respect can not be considered as void, but at most as only erroneous. Appellant could easily have corrected the judgment in this particular at any time within thirty days after the issual of the mandate and, perhaps, at any time during that term of court. It did not do so, and the trial court was directed to render a judgment for the ten per cent. damages. It had no other alternative but to obey the mandate of this court and its action in doing so is neither void nor erroneous. If, as insisted, the order directing damages made in this court on the former appeal was a clerical misprision it could not then be corrected on this appeal, since such errors must be corrected by the court on motion made in the particular case or appeal, in which the error was committed.

As before intimated, under the peculiar facts of this case, and the harsh results which the events following the judgment have created, we have been led to give to this appeal more research and study than is ordinarily done, in the hope that we might find some consistent way to relieve appellant from accounting for any more than the demonstrated value of the brooch; but we have been

unable to do so without making an exception to well settled rules of practice.

In the judgment appealed from there was left in the administrator's hands, after the payment of all claims, the sum of \$363.57, which the court ordered to be distributed equally among the three children of the decedent. Appellee H. M. Stanley, one of the children, in his cross appeal complains of that action of the court and contends, as he did below, that that balance should be paid to him in partial settlement of attorney's fees heretofore paid by him in all of the litigation seeking to charge the administrator with the value of the brooch, as was finally done. The commissioner reported that appellee had paid \$500.-00 individually to attorneys in prosecuting the litigation for the benefit of the estate, and that he should receive the balance of \$363.57. The court declined to confirm the report in this particular and ordered the fund distributed as stated. In this we think the court erred. It is the settled practice, frequently upheld by this court, to allow a litigant attorney's fees in the settlement of estates when the services of the attorney benefited the estate by bringing funds into it, or in defeating claims against it. In conformity with that rule appellee should be paid the balance of the funds for which he contends, and which, as we have seen, only partially repays him for a reasonable attorney's fee.

Wherefore the judgment is affirmed on the original appeal, and reversed on the cross appeal to the extent indicated, with directions for the court to modify the judgment as herein directed.

**Elkhorn Coal Corporation v. Guttadora, an Infant,
By, &c.**

(Decided March 8, 1921.)

Appeal from Letcher Circuit Court.

1. **Exceptions, Bill of—Bystanders' Bill**—Where, after overruling the motion of an unsuccessful litigant for a new trial, granting him an appeal and giving him until a day certain of the succeeding term to file a bill of exceptions, the judge of the circuit court who presided on the trial and overruled the motion for a new trial, dies within the time fixed for filing the bill of exceptions, the filing of a bystanders' bill is allowed by Civil Code, sec. 337, subsection 5.

2. **Infants—Right to Sue—Demurrer.**—Where, in an action of an infant by his next friend, the latter's residence in this state, his freedom from disability and right to sue for the infant are neither stated in the petition, verified by his oath, nor in an affidavit from him accompanying the petition, the absence from the record of such a showing of his right to sue for the infant, may be objected to by special demurrer or by a motion to dismiss. But in either case the objection must be made before the filing of an answer by the defendant presenting his defense, otherwise it will be regarded as waived.
3. **Infants—Pleading.**—The ruling of the trial court permitting the appellee, two years after the institution of the action by next friend, to file an amended petition alleging his arrival at twenty-one years of age and right to maintain the action in his own name alone, was not error.
4. **Master and Servant—Negligence—Printed Rule.**—Where in an action by a servant against his master to recover damages for personal injuries alleged to have been caused by the latter's negligence, a ground of defense relied on was that the injuries of the servant were wholly caused by his own negligence in wilfully putting himself in a place of danger forbidden by a printed rule of the master with which he was familiar, and there was evidence supporting such defense, the refusal of the trial court to give an instruction offered by the master which properly told the jury the effect of such violation of the rule was reversible error.

FIELDS & FIELDS, E. C. O'REAR, W. YOUNG and W. G. DEARING for appellant.

C. W. NAPIER, D. D. FIELDS and T. E. MOORE, JR., for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This is an appeal from a judgment of the Letcher circuit court, entered upon the verdict of a jury awarding the appellee, Joe Guttadora, \$7,000.00 damages against the appellant, Elkhorn Coal Corporation, for personal injuries sustained by him, as alleged in the petition, through the negligence of the latter. The appellant is engaged in the business of mining and selling coal in Letcher county and owns and maintains in and about its mine railroad tracks and switches upon which it operates by electricity and the use of motors, cars for removing and hauling all coal mined to a nearby railroad over which it is shipped to various markets.

It is alleged in the petition that the appellee, by appellant's employment, entered its service as a brakeman

or mine helper about a month before his injuries were received, the duties required of him being such as are incident to the "breaking" of cars, opening and closing of mine switches and mine trap doors, in hauling coal from the various entries of the mine penetrated by car tracks. The manner of receiving his injuries is set forth by appellee in the petition as follows:

"That on or about July 2, 1915, while riding in one of the empty cars in performance of his duties, which car, with others, was being propelled over the tracks in the mine of the defendant, one of said cars jumped the track causing the train of cars to be wrecked and the plaintiff thrown therefrom; that the car jumped the track and split the switch at or near entry number 5, and after throwing plaintiff from the forward car in which he was riding, said cars were further driven over and upon plaintiff, crushing and greatly injuring his right foot."

It was also alleged in the petition that the injuries thus sustained by appellee, were caused by the negligence of appellant in failing to provide him a reasonably safe place in which to work, and that the derailment of the cars and his consequent injuries resulted from its negligence in permitting such an accumulation of dirt upon and against the switch track entry in question as obstructed and prevented the cars from moving over and remaining upon the same. By an amended petition it was alleged that the cars of appellant were derailed and appellee injured because of its further negligence in failing to provide the track at the place of the accident with guard rails, which would have prevented the cars from being thrown from the track. Shortly after the institution of the action it was, upon appellant's petition therefor, transferred by the Letcher circuit court to the United State district court for the eastern district of Kentucky, but that court refused to take jurisdiction of the case and, upon appellee's motion, by proper order, remanded it to the Letcher circuit court. After its return to the latter court appellant filed its answer to the petition which specifically denied the several acts of negligence therein charged against appellant and alleged contributory negligence and assumption of risk on the part of appellee; which pleas were controverted by reply.

Before taking up the several grounds urged by appellant for the reversal of the judgment appealed from, we find it necessary to pass on a motion made by the appellee

to strike the bill of exceptions from the record, consideration of which was postponed to the submission of the appeal on its merits. The motion is based on the grounds that, though filed within the time fixed by the order of the circuit court, the bill of exceptions can not be considered by the appellate court, because (1) it is a bystanders' bill; (2) it does not bear the approval or certification of the judge who presided at the trial of the case in the circuit court. It is apparent from the following facts that the motion can not prevail: The case was tried during the August term, 1919, of the Letcher circuit court and the appellant's motion for a new trial overruled at the same term; and when overruled an appeal was granted and appellant given until the 10th day of the next regular (January 1920) term of the court in which to file its bill of exceptions. It appears from the record that before the beginning of the August term, 1919, of the Letcher circuit court, the circuit judge of that court and of the judicial district in which Letcher county is situated, the Hon. John F. Butler, died, and that Judge Childers was duly appointed and commissioned circuit judge of the district by the Governor to fill the vacancy in the office caused by Judge Butler's death until a successor to the latter could be elected at the regular election in November, 1919. So Judge Childers properly presided as judge of the Letcher circuit court throughout its August term and during the trial of this case at that term, and therefore had the authority to allow appellant the extension of time to a day in the succeeding January term, 1920, within which to file the bill of exceptions; but as after the trial and granting of time to file the bill of exceptions, Judge Childers went out of office and was succeeded by the present incumbent, Judge Roscoe Vanover, who was duly elected at the regular election in November, 1919, his approval or signature to the bill of exceptions upon or after the filing thereof in court at the January term, 1920, and within the time fixed by the order of the previous term, would have been unauthorized. It is equally true that the approval and certification of the bill by his successor in office, Judge Vanover, who properly presided as judge of the Letcher circuit court at its January term, 1920, was unnecessary and added nothing to its authenticity. Manifestly in the situation presented by the facts stated appellant could have obtained in no other way than through bystanders a bill of exceptions for the

purposes of an appeal. Civil Code, section 337; *Sandy Valley and Elkhorn Railway Co. v. Bentley*, 175 Ky. 756; *U. S. Fidelity and Guaranty Co. v. Travelers Ins. Machine Co.*, 167 Ky. 382. It follows from what has been said that the course pursued by appellant in the matter of preparing and filing its bill of exceptions as certified by bystanders, was authorized by the Civil Code, sec. 337, subsec. 5, and the construction given its provisions by us in the several cases, *supra*. For the reasons stated appellee's motion to strike the bill of exceptions from the record is overruled.

Looking now to the several grounds relied on by the appellant for a reversal of the judgment, we find that it first complains of the refusal of the trial court to sustain its motion to dismiss the appellee's action because of the failure of the next friend suing for the latter to file with the petition an affidavit showing his qualifications and right to maintain the action in that capacity. The motion was rested upon the Civil Code, sec. 37, subsec. 1, which provides:

"No person shall sue as next friend unless he reside in this state and be free from disability, nor unless he file his own affidavit showing his right to sue as next friend according to the provisions of this chapter."

The absence from the record of such an affidavit by the next friend may be objected to by special demurrer, as for want of capacity in him to maintain the action, or by motion by the defendant to dismiss it, but in either case the objection must be made before the filing of an answer by the defendant presenting his defense. *Staton v. Bryant*, 5 R. 426; *Campbell v. Creher*, 110 S. W. 353. But even when the motion is so made, the next friend should still be allowed to file the necessary affidavit if he asks to be permitted to do so. In the instant case, however, the motion of appellant to dismiss the action came too late as it was not made until after the case had been remanded from the federal court to the Letcher circuit court and after the filing of its answer; hence the action of the circuit court in overruling it, was not error.

Appellant also complains of the ruling of the trial court in permitting appellee two years or more after the institution of the action, to file an amended petition setting up the fact that he had become twenty-one years of age and asserting the right to maintain the action in his own name. This ruling of the court was not error, for it

is allowable under the practice in this jurisdiction to permit an infant whose action is prosecuted by a next friend upon arriving at age, to be substituted as plaintiff, which may be done by a suggestion of record or the filing of an amended petition. *Clements v. Ramsey*, 9 R. 172. Nor was it, as claimed by appellant, error for the court to allow appellee to set up in the amended petition in question as a further act of negligence on appellant's part causing his injuries, its alleged failure to provide its railroad track at the place of the accident with guard rails. Such act of negligence did not constitute a new cause of action, but was germane to and a part of its negligence, if any, in failing to provide appellee a reasonably safe place for his work, complained of in the original petition.

We find, however, that the trial court committed a reversible error in refusing instructions A and B offered by appellant, the first relating to the appellee's violation of a printed rule forbidding its servants to ride upon the bumpers of its cars and properly advising the jury of the effect of a wilful disobedience of its warning. Both by plea and proof appellant relied on appellee's alleged violation of this rule as a defense; and while his evidence tended to show that he was riding in and not upon the bumper of the forward car when thrown off and injured, that of appellant conduced to prove that he was then riding on the bumper, a place of great danger, and that he was familiar with the printed rule forbidding it, which was kept posted at the entrance of and in other conspicuous places in and about the mine. We have repeatedly and consistently held that where the servant knowingly and willfully violates a printed rule provided by the employer for his safety, and there is proof tending to show that his injuries may be attributed to its violation by him, there can be no recovery. *L. & N. R. R. Co. v. Moran*, 148 Ky. 418; *L. & N. R. R. Co. v. Kroft*, 156 Ky. 66; *L. & N. R. R. Co. v. Smith's Admr.*, 186 Ky. 35; 26 Cyc. 1267. Appellant was also entitled to instruction B relating to assumption of risk, as this defense was also relied on by appellant. Obviously, the action of the trial court in refusing these instructions was prejudicial to appellants' substantial rights.

The court should therefore have given instructions A and B, either as offered, or in such language as would have given the jury the meaning of the law they intended to convey. We find no material error in the instructions

that were given. But on account of the error in refusing instructions A and B, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

Randolph v. Lloyd Castle and Others.

(Decided March 8, 1921.)

Appeal from Johnson circuit Court.

1. **Frauds, Statute of—Agreements Not to be Performed Within a Year.**—A contract not in writing and which is not to be performed within a year is within the statute of frauds and unenforceable.
2. **Master and Servant—Action to Recover for Time Lost.**—To entitle one to recover for time lost while out of employment he must aver and prove that he made reasonable effort to find employment and to earn wages.
3. **Frauds, Statute of—Part Performance Will Not Take Case Out of Statute.**—Where one undertakes to mine and load coal for another for three years, but the contract is not in writing, and he performs some of the work and receives full compensation for the same according to the contract, the part performance does not take the case out of the statute of frauds if that which remains to be done is not capable of performance within one year. In such case the plaintiff cannot recover for the loss sustained by him if there was no resulting benefit to defendant.

HOWES & HOWES for appellant.

A. J. KIRK and F. P. BLAIR for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

This appeal seeks the reversal of a judgment for \$800.00 in favor of Lloyd Castle, Ray Castle and J. C. McCoy, against H. H. Randolph operating under the firm name of Jenny Creek Black Coal Co. The three plaintiffs are expert coal miners and were engaged by the superintendent and foreman of Randolph to mine and load coal at his mines, at the price of \$2.10 per ton, they to keep up the entry, drain the water, supply their own dynamite and do certain other specified things, the doing of which was necessary to the production of coal.

The original petition avers that on the 7th day of November, 1918, plaintiffs entered into a contract with defendant Randolph whereby the defendant undertook

and agreed to pay them \$2.10 per ton for all coal mined and loaded by them into the shute at the mine, furnish each of them a house to live in free, do all the blacksmith work free, and give them three years' work at which he guaranteed plaintiffs a minimum of \$15.00 each per day, and should the mine close down or for any reason fail to run and plaintiffs were out of employment they were each to be paid \$15.00 per day for all such lost time; that the plaintiffs entered upon the performance of the contract, moved their families to defendant's mines at an expense of \$190.50 and incurred other expenses. They worked twenty-one days during which time they averaged more than \$15.00 each per day; that the mines then closed down without plaintiffs' fault and did not resume operation, and plaintiffs were left unemployed for a period of thirty days all of which time plaintiffs were ready, able and willing to perform their part of the contract by mining and loading coal; that they at the instance of the mine foreman did some miscellaneous work about the mine, and also shot loose and left 128 tons of coal in the mine. The prayer asked judgment against Randolph for the sum of \$1,845.00. Three or four amendments were filed to the petition, to which a general demurrer was pending all the time. As the petition did not allege the contract to be in writing, the general demurrer was intended, in part, to raise the question of the right of plaintiffs to maintain the action to enforce the parol contract, which was not to be performed within one year. There was no sufficient averment that plaintiffs had used diligence to procure other employment during the time the mines were shut down. Later on an amendment was filed which in part cured these defects, and the demurrer was overruled by the trial court, giving the plaintiffs the benefit of the doubt.

The plaintiffs have a cause of action against Randolph, and can, as the contract was a joint one, maintain a single action for the relief of all, but this can not be bot-tomed in any measure upon the three year contract as averred in the original and first amended petition.

The evidence of Lloyd Castle who made the contract on behalf of plaintiffs makes it clear that the contract was for three years, and that no other agreement was made except the one for that period. It was, therefore, within the statute of frauds and the trial court should have so held as a matter of law. With this contract eliminated plaintiffs were entitled to recover, if at all, on the quan-

tum meruit. This necessitated plaintiffs showing the value of the services performed. As the mine foreman went away leaving instructions to plaintiffs to do certain work in and about the mine without any specific agreement as to the price to be paid for such work it devolved upon plaintiffs to prove its nature and reasonable value.

It is argued that as the contract was in part performed, the statute of frauds has no application. In so far as the contract was performed by the plaintiffs mining and loading coal and the defendant paying for same, there was a complete adjustment and settlement, not under the three year contract but of the existing corresponding obligations, and all are bound thereby. But plaintiffs can have no recovery for lost time under the three year contract for defendant Randolph received no benefit or advantage from the loss of time which plaintiffs suffered. It is otherwise with respect to the doing of the work at the mines and loading of coal by plaintiffs, for the defendant did get the benefit thereof, and while not liable to plaintiffs on the three year contract, is liable to them on *quantum meruit*, and must pay the reasonable value of the services performed.

As the evidence proves that plaintiffs shot down and prepared a quantity of loose coal in the mine which was not placed by them in the shute because there was no room for the coal, the first instruction should have been modified so as to have submitted only the question of reasonable value of the labor performed by plaintiffs in the preparation of said loose coal in the mine without reference to the alleged contract price of \$2.10 per ton, for that price was for coal placed in the shute and not for loose coal in the mine.

The second instruction given by the court should have been omitted because it is based upon the three year contract.

The third instruction should have been given with some modifications. If the plaintiffs at the instance of defendant's mine foreman remained at the mine, ready, willing and able to work, but were assigned no duties and thereby lost time, the defendant is liable to them for the reasonable value thereof, for if plaintiffs remained there at his request and on his assurance that they were to have employment and thus earn pay, and but for such request would have sought and obtained other remunerative employment, the loss must be borne by the defendant, the

one who caused it. This was the basis of their right of recovery for lost time, and should have been embraced in the instructions, omitting all other reference thereto.

Instructions 4, 5, 6, 7 and 8 are substantially correct.

The evidence as to time lost by plaintiffs should be confined to that which was lost while they were waiting, at the request of the mine foreman, to perform work, and plaintiffs must prove its reasonable value and can not rely upon the original contract price.

Judgment reversed.

Seiler v. Dillon, County Clerk, Kenton County, Kentucky, and Reed, County Judge of Kenton County Court.

(Decided March 8, 1921.)

Appeal from Kenton Circuit Court.

1. **Municipal Corporations—Elections—Notice.**—That part of section 29, chapter 112, Acts 1920, which requires the sheriff or other officer having charge of the election "to have the order published in some weekly or daily newspaper published or circulated in said county for at least two weeks before election, and also to advertise the same by printed or written hand bills posted in conspicuous places in said city for the same length of time" is mandatory and not merely directory and must be substantially complied with or the election will be void.
2. **Municipal Corporations—Elections—Notice.**—The special election must be advertised both by newspaper and by handbills for the time specified in the act to sustain the election.
3. **Injunction—Officers May be Enjoined From Doing Ministerial Act.**—An officer, even a judge of a court, may be enjoined from doing a mere ministerial act in the performance of his duties, such as the entry of a copy of a certificate of an election, or result of an election on his order books.

JOHN E. SHEPHERD for appellant.

F. J. HANLON and EDWARD J. TRACEY for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

On the first day of last September a petition signed by the required number of citizens of the city of Covington, a city of the second class, was filed with the judge of

the Kenton county court, in accordance with provision of section 29, chapter 112 of the acts of the General Assembly, 1920, asking that an election be called in that city on the regular November election day, to take the sense of the voters of said city, on the question, "Shall the city of Covington abandon its organization and government under the provisions of an act to amend an act entitled:

" 'An act for the government of cities of the second class in the Commonwealth of Kentucky, approved March 19, 1894.' "

The judge of the county court entered an order calling the election and the county clerk gave the sheriff of the county a certified copy of the order within five days after the making thereof, as provided in the act, and the sheriff caused the order calling the election to be published for two weeks in a daily newspaper of general circulation published in the city of Covington, as required by the act, but he failed to advertise the election by printed or written handbills posted in conspicuous places in said city for as much as two weeks before the election, or to begin such advertisement within seven days after receiving copy of the order as required by the act.

This failure to comply with the statutes requiring the election to be advertised by handbills, and because the election was held at the same time a city commissioner was to be and was voted for and elected for a short term, the statute requiring it to be held at a time when no commissioners were to be elected, is relied on as an invalidation of the entire election.

It is also insisted by the appellees that prohibition and injunction are not the proper remedy in this character of case, where the county judge and county clerk are sought to be prevented from entering an order showing the result of an election, which is but the performance of a ministerial duty directed and required of them by statute. This position is not tenable for we have repeatedly held that an officer may be enjoined from doing a purely ministerial act upon proper application and showing. *McCreary, Governor v. Williams*, 153 Ky. 49; *Hutchinson v. Miller*, 158 Ky. 368; *McCreary, Governor v. Speer*, 156 Ky. 783.

It is admitted that the newspaper advertising was done in accordance with the requirements of the statutes, and on the other hand it is denied that the handbills advertising the election were posted two weeks before the

election, but were posted for only about ten days, not within seven days after the certified copy of the order calling the election was delivered to the sheriff whose duty it was to cause the handbills to be printed and posted.

On these uncontroverted facts we are asked to hold the election invalid and to enjoin the defendants from certifying and entering the results of the election on the order books.

It is insisted, however, by counsel for appellees that as there was full compliance with the newspaper advertising and a partial compliance with the handbill requirement, and the further fact that individuals and organizations gave great publicity to the election by causing bills to be posted containing the order calling the election, and the additional fact that a very large vote was cast, there was a substantial compliance with the requirements of the statutes and the election should therefore be upheld.

This was a special election called for a special purpose. The rule with respect to following the provisions of the statutes requiring the advertisement of general elections is very different from the rule which governs advertisement of special elections.

The statute under consideration, in so far as it relates to advertising reads as follows:

“Shall be the duty of said sheriff or such other officer, to have such order published in some weekly or daily newspaper, published or circulated in said county, for at least two weeks before the election, and also to advertise the same by printed or written handbills posted in conspicuous places in said city, for the same length of time.”

“The sheriff or such other officer shall have the advertisements and notices herein provided for, posted as herein required, within seven days after he receives the orders of the county court.”

Judge Cooley in his work on Constitutional Limitations states the distinction as follows:

“Where, however, both the time and the place of an election are prescribed by law, every voter has the right to take notice of the law, and deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity, but the right

to hold the election comes from the statute, and not from the official notice. It has, therefore, been frequently held that when a vacancy exists in an office which the law requires shall be filed at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given."

In the case of *Hatfield v. City of Covington*, 177 Ky. 124, we had before us a statute which reads:

"Shall be published for a least two weeks just preceding the election, in the official newspaper, in and for said city."

In holding the election invalid because the requirements of the statute that the election be advertised for at least two weeks was not fully complied with, we said:

"The ordinance calling the election was enacted by the board of commissioners of the city of Covington, on September 21, 1916, and was published in the *Kentucky Post*, the official newspaper for the city of Covington, on September 25th, October 23rd, 24th, 25th, 26th, 27th, 28th, 30th, 31st and November 1st and 2nd, 1916. The *Kentucky Post* is published daily in the city of Covington.

"Eliminating the first publication of September 25th, 1916, as immaterial in the consideration of this question because that day is not embraced within the two weeks named in the statute, it will be observed that the first publication was on Monday, October 23rd, and that the ordinance was published throughout that week ending with Saturday, October 28th. It was likewise published on Monday, Tuesday, Wednesday and Thursday, November 2nd, of the ensuing week, but was not published on Friday, November 3rd, or Saturday, November 4th, of that week, or at a subsequent time. The election was held on the following Tuesday, November 7th."

The opinion in the *Hatfield* case, *supra*, was based in part upon the opinion in the case of *Central Construction Co. v. City of Lexington*, 162 Ky. 286. In the *Lexington* case, which was a bond issue election had under section 3069, Kentucky Statutes, the advertising was for ten days, when it should have been for two weeks, we held the bond issue invalid, saying:

"The cases in other jurisdictions relied on by appellee's counsel as sustaining the sufficiency of the notice given of the election here involved, are based upon stat-

utes unlike that of this state, or attempted to be supported by reasoning we think it unwise to adopt. The provision of the act, *supra*, as to the publication of notice of the election is clearly mandatory; therefore, it will not do to say that anything short of a substantial compliance therewith will suffice; and, obviously, such a failure to obey its requirements as is here shown, must be regarded as fatal to the validity of the bonds issued by the appellee city pursuant to the election."

In the case of *McCreary v. Speer*, 156 Ky. 783, an agreed statement of fact showed that the election on the constitutional amendment was only advertised for sixty days, whereas the statute directed that the advertising should be for ninety days and we said:

"But we do not see that the publication for sixty days can be said to be a substantial compliance with the requirement that the publication shall be made for ninety days. The Constitution requires the publication to be made by the Secretary of State, an officer created by the Constitution; publication made by private persons can not take the place of the publication required by the Constitution, and we can not assent to the conclusion that the notices in the newspaper calling the attention to the failure of the Secretary of State to make the publication required by the Constitution, can take the place of the publication by him; for while this may have drawn public attention sharply to the matter, many persons when they learned that the required publication had not been made, may have thought that the constitutional amendment could not legally be voted on at an election."

A very similar question to the one here involved was considered by this court in the case of *City of Newport v. Glazier*, 175 Ky. 609. There we said:

"Subsection 25, *supra*, provides in express terms that the board of commissioners, shall cause the proposed ordinance or ordinances, or the ordinance and amendment, as the case may be, to be printed once in the official newspaper of the city, and in such other newspaper as the board of commissioners may direct, before such election. It is admitted that the ordinance in question was not published as required by the statute, but insisted that the circulation of the referendum petition among the voters of the city, considered in connection with the large vote in favor of the ordinance, gave it sufficient publicity to justify us in upholding the election. The purpose of the

publication is to inform the voters of the terms and provisions of the proposed ordinance in order that they may vote intelligently on the question. To accomplish this purpose the legislature deemed it wise to afford every voter an opportunity to have a printed copy of the ordinance before him. The importance of following the statute is well illustrated in this case. The ordinance in question contains numerous provisions, some of which, to say the least, are of an unusual character. No voter could comprehend and appreciate the effect of these provisions unless he read them over and examined them with great care. For these reasons the courts generally hold that ordinances which are to take effect on a vote of the people, or which provide for an issue of bonds to be submitted to a vote of the people, must be published in the manner provided by statute, and that mere publicity, which has no legislative basis, is not sufficient to take the place of such publication. We, therefore, conclude that the provisions of the statute with reference to publication is mandatory and that an election held in the absence of such publication is invalid."

The court's latest adherence to this rule will be found in the opinion in the case of *Gollar v. City of Louisville*, 187 Ky. 448, from which we quote:

"In the construction of statutes, where the provisions as to the publication are obligatory, for instance, where the verb 'shall' is employed, as 'such ordinance shall be published,' etc., we have held this to be mandatory, and nothing short of a substantial compliance will satisfy the statute. *Bybee v. Smith*, 61 S. W. 15, 22 Ky. L. R. 1684; *Central City Construction Co. v. City of Lexington*, 162 Ky. 286, 172 S. W. 648; *City of Newport v. Glazier*, 175 Ky. 608, 194 S. W. 771; *Hatfield v. City of Covington*, 177 Ky. 124, 197 S. W. 535. A like conclusion was reached in *McCreary v. Speer*, 156 Ky. 783, 162 S. W. 99, in which it was held that section 256 of the Constitution as to the publication of proposed amendments to that document was mandatory."

In the *Lexington* case, *supra*, the advertisement was required by statute, section 3069, to be published in a newspaper for at least two weeks just preceding the election, and it was actually published ten days, but it was held insufficient. The requirements as to advertising in the *Hatfield* case, *supra*, were the same as in the *Lexington*

ton case, and the election was actually advertised for eleven days, but this was not sufficient to uphold the election. In the McCreary v. Speer case, *supra*, the official advertising was for sixty days, when it should have been for ninety days, but in addition thereto the newspapers on their own account gave great publicity to the election on the constitutional amendment by commenting on the failure of the Secretary of State to publish the notice for ninety days, but all this was held insufficient even in face of the further fact that the voters in large numbers voted on the question at the election.

In each of the foregoing cases as well as in Newport case and Gallar case, *supra*, we held the statute mandatory in its provisions for advertising the election. Following and applying that often repeated rule we must hold in this case that the statute requiring the special election to be advertised both in a newspaper and by printed or written handbills posted at conspicuous places in the city for at least two weeks before the election, mandatory and not merely directory, and the failure to follow the statute was a fatal error invalidating the election.

This rule does not apply, however, to that part of the statute under consideration which provides that the advertising shall be commenced by the sheriff within seven days after the order of the county court is delivered to him, for if there remain as much as two weeks before the election, in which the advertising may be done, the failure to commence it within seven days after delivery of the order to him is not fatal, if the election is properly advertised for such time. This much of the statute being merely directory. *Lancaster v. Hamon*, 153 Ky. 687.

The injunction granted by the lower court and later dissolved by that court is therefore reinstated and made permanent in accordance with the prayer of the petition, staying the county judge and county clerk of Kenton county from entering upon the order books of the Kenton county court the certificate of election evidencing the result of the election on the question of the change in form of government for the city of Covington, and from making or entering any order validating said election.

Judgment reversed.

Tucker, et al. v. Cornett's Administrator.

(Decided March 8, 1921.)

Appeal from Marion Circuit Court.

1. Deeds—Conveyance Between Persons in Confidential Relation—Agreement to Support—Valuable Consideration—Burden of Proof.—The law looks with suspicion upon transactions between persons sustaining confidential relations, and where a mother seventy-one years of age, having other children who have an equal claim on her bounty, conveys to her daughter and son-in-law, who live with her, her life estate in a farm and all her personal property, the burden is on the grantees to show that the transaction was freely and voluntarily made, and devoid of any vice rendering it inequitable or unfair; and the agreement by the grantees to support the grantor and pay her funeral expenses will not be regarded as a valuable consideration sufficient to relieve them of the burden of showing the fairness of the transaction, where the grantor's estate was amply sufficient for all her wants, and she was in no way dependent on the grantees for support, and the grantees were the real beneficiaries of the arrangement.
2. Deeds—Undue Influence—Sufficiency of Evidence.—In a suit to set aside a deed on the ground of undue influence, evidence held to sustain a verdict for plaintiffs.

S. A. RUSSELL for appellants.

C. C. BOLDRICK and W. H. SPRAGENS for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Affirming.

Margaret A. Cornett died a resident of Marion county in February, 1917. She left surviving her three children, Sarah A. Tucker, wife of W. T. Tucker, Mary W. Angell, wife of G. B. Angell, and Isaac Cornett, Jr. Several years prior to her death, Mrs. Cornett's husband conveyed to her a life estate in 256 acres of land, with remainder to her children. Her daughter, Mrs. Tucker, and her husband purchased the remainder interests of the other children. On June 29, 1916, Mrs. Cornett executed and delivered to Sarah A. Tucker and her husband, W. T. Tucker, a deed conveying to them her life estate in the 256 acres of land, and also transferring to them all the personal property which she then owned. The consideration expressed in the deed was that the second parties should board, clothe and take care of her during her life, and give her a decent burial at her death.

Shortly after Mrs. Cornett's death, her son-in-law, G. B. Angell, qualified as her administrator, and brought suit against Sarah A. Tucker and her husband to cancel the deed above referred to, on the ground that it was obtained by fraud and undue influence. The issue of undue influence was submitted to a jury which returned a verdict in favor of plaintiff. Thereupon judgment was entered cancelling the deed, and the defendants appeal.

Sarah A. Tucker and her husband had been living on the farm with Mrs. Cornett for several years. Mrs. Tucker says that her mother fell and broke her hip in the year 1910, and was lame from that time until her death, at which time she was seventy-one or seventy-two years of age. During that time she waited on her mother. Her mother's mind was all right when the deed was made. Mr. Angell was present at the funeral, but Mrs. Angell was not present. However, she did not notify Mrs. Angell of her mother's illness or of her death. Neither she nor her husband was present when the deed was signed. She never knew that the attorney who drew the deed was to be there. Her mother had told her she would do right by her if she stayed there. Her mother never delivered the deed to her until some time after it was executed. She knew nothing of her mother's having written to her attorney. When the deed was executed she did not know what was being done. She never knew it had been executed until her mother delivered it to her. After her marriage, her husband rented portions of the farm and paid her mother. W. T. Tucker testified that Mrs. Cornett was a bright, strong minded woman and had her way in most everything. Mrs. Cornett never said anything to him about making the deed, and at no time did he mention the matter to her. He was at the barn when the deed was executed but returned to the house before the men left. He never inquired as to why the attorney who drew the deed was there. He didn't know the purpose of the trip until several weeks after the deed was executed. He never attempted to influence Mrs. Cornett, but always let her have her own way. Miss Worswick, the official court reporter, testified that she had a conversation with Mrs. Cornett, who spoke of the difference in the treatment of her by her two daughters, and said that Mrs. Tucker had always been good and kind to her and that she wanted to pay her daughter for her kindness. At that time her mind was good. She was a bright woman of strong will

power. On cross-examination the witness stated that while Mrs. Cornett was giving her deposition in a case in which Mrs. Cornett was a party, she looked at Mrs. Tucker and Mrs. Tucker would nod her head to indicate how she wanted her mother to answer the question. Witness further stated that she wrote the deed. Mr. Spalding, who took Mrs. Cornett's acknowledgment to the deed, stated that when the deed was signed and acknowledged, there was no one present except Mrs. Cornett, the attorney and himself, though, when he went into the room, another lady and gentleman were there. S. A. Russell, the attorney who drew the deed, testified as follows: Mrs. Cornett told him she wanted to give what little property she had to her daughter, as the latter had been a perfect slave to her. Later on he got a letter from her and he dictated the deed. The same day, or the day following, he and Mr. Spalding drove out to Mrs. Cornett's. Mrs. Cornett was standing in the door. He went in and talked for a while and read the deed over. Mrs. Cornett stated that it suited her exactly. He then went to the door and called Mr. Spalding, who was in the automobile. Neither Mrs. Tucker nor Mr. Tucker was in there when the deed was read over to Mrs. Cornett, or when she signed and acknowledged it. He did not recall that either of them was in there until about the time he started to the door. When he started to leave, he saw Mrs. Tucker at the back door. She had been washing and had her sleeves rolled up. After getting outside he saw Mr. Tucker and went and talked to him. M. L. Longmire testified that Mrs. Cornett's mind was good. She seemed to be a bright woman. From what he knew of her, he thought she could take care of herself. He never saw any dictation on the part of Mrs. Tucker, but had heard Mrs. Tucker and her husband advise Mrs. Cornett about matters. 'Such transactions which he had with Mrs. Cornett were through Mr. Tucker, who, it seems, was running the farm. Dr. J. C. Beard, Mrs. Cornett's family physician, testified to the fact that Mrs. Tucker nursed her mother. He further stated that Mrs. Cornett's mind was good and that she was a positive character.

For the plaintiffs, Mrs. Angell testified that when the family started to move to Marion county, Mrs. Tucker told her mother not to come unless her father would make the children safe in a home, and the deed to the farm was made as Mrs. Tucker demanded. While witness lived at

home she did a great part of the work. When she married, Mrs. Tucker was not present and cursed and abused her husband. Mrs. Tucker cut up terribly and her mother couldn't do anything to make her behave. She had some household goods and her mother told Mrs. Tucker to get some sheets and bolster slips. Her sister selected the worst things in the house. She and her sister had purchased some dishes together, and when she went to leave her sister wouldn't let her have her half unless she would pay for all of them. On one occasion her father gave her a cow to sell, but her sister said, "No, you will not sell her. There isn't going to be a cow sold. I'll be damned if I don't see to that." She also related other circumstances tending to show the domineering character of Mrs. Tucker. Once she made a visit to her mother and her sister told her it was quite a busy time to run in and make a visit. Her mother told her that she had received very bad treatment from Sarah, and when witness was at the house the treatment was worse. Witness lived in Laurel county, and her sister didn't advise her of her mother's death. On cross-examination she stated that she and her sister never got along well together, and that her sister dictated the policies of the family. Her sister was a regular tyrant with her mother. G. B. Angell testified that he went to Mrs. Cornett's on one occasion to get some papers to be used in a suit. Mrs. Cornett told him that the papers were in a trunk, but that Sarah would not let her have the key, but not to say a word about it. He further stated that he was present on one occasion when Mrs. Cornett gave a deposition, and that before she would answer, she would turn to see if Sarah nodded her head. When this occurred, the attorney would repeatedly object. Miss Black, who lived at London, testified that on one occasion Mrs. Cornett came to her home and asked her to call Mrs. Angell who lived out in the country. Mrs. Cornett told her to tell Mrs. Angell that she wanted to see her and the children, but that she could not go out then, but would have to come back in the summer as she promised her daughter, Sarah, to come home at a certain time. On the same occasion Mrs. Cornett tried to talk to Mrs. Angell over the telephone, but when she heard the latter's voice she broke down and couldn't talk. J. W. Bengé testified that he heard Mrs. Cornett say she intended for Warnie (Mrs. Angell) to have her part of her estate. Albert Tungate testified that he worked on Mrs.

Cornett's place for a while. During that time Mrs. Tucker had control of the operation of the farm, directed him what to do and settled for everything. Mrs. Cornett had nothing to do with the place. Mrs. Cornett told him that she would like mighty well to see Warnie. William Hasty testified that he had heard Mrs. Cornett say she had one daughter that he had never seen, that it had been a right smart while since she had seen her, and that she had never seen any of her children. She further stated that she would like to see them, and that she had no preference among her children. Mrs. Walker Gribbins stated that she was present about the time Mrs. Cornett's husband died. Issac Cornett asked Mrs. Tucker if she had notified the Angells, whereupon Mrs. Tucker said that she didn't know if the Angells or those fools would be at home. Walker Gribbins testified that Mrs. Cornett said to him that she would like very much to see Mrs. Angell's children.

In rebuttal Mrs. Tucker denied the various circumstances detailed by Mrs. Angell. Though she had cursed at times, she did not curse on the occasions referred to by her sister. She further stated that she had never refused to let any one have the trunk key to get papers, as her mother carried the key and kept her own papers.

The court did not err in placing the burden of proof upon the defendants. Mrs. Cornett was seventy-one years of age when the deed was made. Mrs. Tucker and her husband had lived with her for several years. The other children had gone away to establish homes for themselves. The relationship between the mother and daughter was of a very close and confidential character. Where, under circumstances like these, the mother transfers all of her property to her daughter and her daughter's husband, when there are others who have an equal claim on her bounty, the law looks with suspicion upon the transaction, and casts upon the grantee or donee the burden of showing that the transaction was freely and voluntarily entered into, and devoid of any vice that would render it inequitable or unfair. *Miller v. Taylor*, 165 Ky. 463, 177 S. W. 247. Nor does the fact that the deed was executed in consideration of the grantees' agreement to support and take care of the grantor during her life, and give her decent burial at her death, change the rule. It is not claimed that the Tuckers intended to move elsewhere but were induced to remain by the con-

veyance. In addition to owning a life estate in the farm, which was a valuable one, Mrs. Cornett owned a large amount of personal property. It will thus be seen that her estate was amply sufficient for all her wants, and that she was in no way dependent on the Tuckers for support. Under these circumstances the Tuckers were the real beneficiaries of the arrangement, and their agreement to support Mrs. Cornett and pay her funeral expenses will not be regarded as a valuable consideration sufficient to relieve them of the burden of showing the fairness of the transaction. *Davidson v. Davidson*, 180 Ky. 190, 202 S. W. 493.

The chief complaint of appellants is that the verdict is not supported by the evidence. There are many circumstances tending to show that Mrs. Tucker was the dominant character in the household and controlled the family policies. When her sister visited in the home, she made her feel that she was not wanted, and never even let her know of her mother's illness and death. Her influence over her mother is shown by the fact that when her mother was giving her deposition in a certain case, her mother would not answer until she nodded her head to indicate what the answer should be. On the whole, the evidence given by the Tuckers to rebut the presumption of undue influence is not very convincing. Though living in the house with Mrs. Cornett, and though the deed was put to record a day or two after it was executed, they both claim that they did not know of her purpose to make the deed, or of the fact that the deed was made, until several weeks after its execution. It is by no means probable that Mrs. Cornett would have made the deed in consideration of the Tuckers' agreement to support and take care of her, unless the Tuckers had agreed to the arrangement. Considering the case in the light of all the circumstances, and particularly in the light of the rule that the burden was on the Tuckers to show the fairness of the transaction, we are not prepared to say that the verdict is not sustained by the evidence.

Judgment affirmed.

Lashley Telephone Company v. Durbin.

(Decided March 8, 1921.)

Appeal from Edmonson Circuit Court.

1. **Licenses—Respecting Real Property—Incurring Expenses—Revocation.**—Where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement, by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition, after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense; and this rule is particularly applicable to a telephone line constructed by a licensee engaged in the business of serving the public and possessing the right to acquire property for that purpose by condemnation, and where such a line has been constructed under an oral license, the licensor cannot revoke the license and compel the removal of the line.
2. **Vendor and Purchaser—Title as Against Third Party—Licenses.**—Where a vendee purchases property, over which a telephone line has been constructed, under a parol license from his vendor, and the telephone line is open and visible, he purchases subject to the right of the telephone company to maintain such line, and even if the owner had the right to revoke the license and require the removal of the structure, such right does not pass to the vendee.
3. **Vendor and Purchaser—Title as Against Third Party—Licenses—Estoppel.**—Under such circumstances the telephone company's right in the premises is limited to the maintenance of the telephone line as it existed at the time of the purchase, and the purchaser is, not estopped to complain of the stringing of additional wires.

SIMS, RODES & SIMS, JOHN B. RODES, JOHN H. GILLIAM
and B. T. ROUNDTREE for appellant.

LOGAN & McCOMBS for appellee.

OPINION OF THE COURT BY JUDGE CLAY—Reversing.

In the year 1917, Charles Lashley and his two sons began the erection of a telephone system in Edmonson county, for the purpose of affording communication between persons living in that neighborhood. T. L. Bush, who owned a farm, not only encouraged and contributed to the enterprise, but gave the Lashleys permission to construct the system over his farm. Thereupon the Lash-

leys erected fifteen telephone poles with cross arms on Bush's land, and strung thereon two lines of four wires. Afterwards, the Lashley Telephone Company was incorporated and acquired a long distance connection at Leitchfield. About fourteen months after the completion of the system, Bush sold his farm to Ephraim Durbin, who knew that the telephone system had a right of way over the farm. Later on, other persons sought telephone connections and bought boxes for that purpose. In order to accommodate them it was necessary to string two additional wires. After the employees of the telephone company had stretched the wires over the cross arms, but had not attached the same, Durbin cut the wires and removed them from the poles.

This suit was brought by the telephone company to enjoin Durbin from removing or interfering with the telephone system. Durbin filed an answer and counterclaim, in which he asked an injunction requiring the telephone company to remove the poles and wires. On final hearing the petition was dismissed, and plaintiff was directed to remove the poles and wires. From that judgment plaintiff appeals.

Though many courts hold that a licensee is conclusively presumed as a matter of law to know that a license is revocable at the pleasure of the licensor, and if he expend money in connection with his entry upon the land of the latter, he does so at his peril, *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304, 53 N. W. 639; *Hathway v. Yakima Water, Light & P. Co.*, 14 Wash. 469, 44 Pac. 896; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509; *Harris v. Gillingham*, 6 N. H. 9, 23 Am. Dec. 701; *Crosdale v. Laningan*, 129 N. Y. 604, 29 N. E. 824, yet it is the established rule in this state that where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense; and this rule is particularly applicable to a telephone line constructed by a licensee engaged in the business of serving the public and possessing the right to acquire property for that purpose by condemnation, and where such a line has been constructed under an oral license, the licensor

can not revoke the license and compel the removal of the line. It is also the settled rule that where a vendee purchases property, over which a telephone line has been constructed, under a parol license from his vendor, and the telephone line is open and visible, he purchases subject to the right of the telephone company to maintain such line, and even if the owner had the right to revoke the license and require the removal of the structure, such right does not pass to the vendee. *Carrollton Telephone Exchange Co. v. Spicer, et al.*, 177 Ky. 340, 197 S. W. 827; L. R. A. 1918A, 950. Here not only was Durbin informed of the fact that the telephone company had a right of way over the land which he purchased, but the telephone line was open and visible. Hence he purchased subject to the right of the telephone company to maintain the line as it then existed, and it was error on the part of the court to compel the telephone company to remove its poles and wires.

It remains to determine whether the telephone company had the right to string additional wires. In its behalf it is argued that it was understood by the Lashleys and Bush that the Lashleys should furnish the telephone service to the local community, and the right of way was granted for that purpose. Hence it was not only contemplated that the company should have the right to build the wires that were then necessary, but to build such additional wires as might be needed to meet the requirements of the community in the future. Under these circumstances Durbin acquired the property burdened not only with the wires then in use, but with such additional wires as might be reasonably necessary to accommodate the company's patrons, and the stringing of the two additional wires did not impose any additional burden. It seems to us that the case is not controlled by what was in the contemplation of the parties when the license was originally granted. If such were the rule, then other poles, as well as other wires, might be added. The rule proceeds on the theory that the grantee purchased with knowledge of an existing structure, and can not therefore insist on the right of removal. The rule should not be extended to include a burden not existing at the time of the purchase. It can not be doubted that additional wires would impose an additional burden. Employees whose presence on the land would not otherwise be necessary would have to go on the land for the purpose of

stringing the wires and keeping them in repair. Not only so, but the additional wires would necessarily increase the chances of injury to the owner's family and employees, as well as to his stock. We therefore conclude that the company's right in the premises is limited to the maintenance of the telephone line as it existed at the time of Durbin's purchase, and that Durbin is not estopped to complain of the stringing of additional wires.

Wherefore the judgment is reversed and cause remanded for proceedings not inconsistent with this opinion.

Louisville & Interurban Railroad Company v. Murphy.

(Decided March 8, 1921.)

Appeal from Oldham Circuit Court.

1. **Damages—Action for Personal Injuries—Evidence.**—When a verdict in a personal injury action is so large that it cannot be sustained unless the injuries are permanent, there must be positive, clear and satisfactory evidence on this issue.
2. **Damages—Excessive Damages—Earning Capacity.**—One's earning capacity enters into the question whether such a verdict is excessive, as well as business losses claimed to have been suffered as a result of the injury. But the evidence in this case only shows that the appellee had disposed of his farm and Louisville business, but does not show that it was necessary for him to do so as a result of his injuries, or that he sold either at a loss.
3. **Damages—Personal Injuries.**—Evidence as to permanency of injuries examined and held not to be clear or satisfactory.

STRAUS, LEE & KRIEGER and WILLIS, TODD & BOND for appellant.

EDWARDS, OGDEN & PEAK, FRED FORCHT, N. C. CURETON and PAUL DOHERTY for appellee.

OPINION OF THE COURT BY TURNER, COMMISSIONER—
Reversing.

On the morning of May 3, 1917, the appellee, Murphy, was a passenger on one of appellant's cars going into Louisville. While running at a high rate of speed on a curve near Anchorage the car left the track and appellee received several injuries in the nature of cuts, bruises and minor fractures hereinafter considered.

This is an action by appellee for damages growing out of his injuries on that occasion, and upon a trial the jury returned a verdict for \$15,000, upon which judgment was entered, and the company's motion for a new trial having been overruled, it has appealed.

The only ground upon which a reversal is asked is that the verdict was grossly excessive, and a consideration of that question involves an analysis of the whole evidence bearing upon the injuries received and their nature and extent.

In addition to the evidence of the plaintiff himself as to the injuries, there were introduced on this issue for the plaintiff Doctors Mason, Weidner and Pope, and for the defendant Doctors Harris and Abell.

Of these five physicians who testified, Dr. Mason, who lived near the scene of the accident, first reached appellee after his injuries. Dr. Weidner, who had formerly been appellee's family physician, was sent for upon his arrival at the hospital at Louisville an hour or so after the injury, as was Dr. Abell, a distinguished surgeon of that city. Dr. Pope first examined the appellee a little more than a year after the accident and treated him for some time, and Dr. Pope was present when Dr. Harris, a representative of appellant, examined the appellee a few days before the trial, which occurred more than two years after the accident.

Appellee himself testifies that immediately after the accident he was unconscious for a short while; that he recovered consciousness before he was removed from the car and taken across the street to a grocery store; that he was bleeding freely and had many cuts on his body; that Dr. Mason arrived shortly after the accident and dressed his wounds; that he remained there for one-half or three-quarters of an hour, when he was taken in an automobile to the St. Joseph's Infirmary in Louisville; that Dr. Weidner, who had been his family physician, was sent for but did not come immediately, and that Dr. Abell was also sent for; that he had two ribs broken on the left side; that the temporary bandages were removed when he reached the infirmary and his several wounds were re-bandaged; that his nose was broken and there were other cuts and bruises on his head, and that there was a cut (not very deep) on his neck; that he remained at the infirmary two or three weeks, he supposes, and was under the care of the doctors all that time; that at the expiration of that time he was taken to his home near Crestwood and that it

was two weeks after he came home before he went out much, although he was out on the porch during that time; that he had never been able to do very much business since the accident; that about thirteen years before the accident in question he had received an injury to his right foot in a street car accident in Louisville, as a result of which it had been necessary to amputate two of his toes on that foot; that in the accident here involved his hip and back were bruised and he still suffered a good deal of pain and was no better at the time of the trial than he was two months after the accident; that he had not slept well since the accident and that he was then deaf in his left ear from the lick on the side of his head received in the accident; that he had been under the care of a doctor most of the time since the accident occurred; that Dr. Abell was the principal man in charge of his case while he was at the infirmary; that he was able to go to his place of business in Louisville in six or seven weeks after the accident; and that in August following he went to New York unaccompanied; that he drove his own automobile almost every day and had no difficulty running it for short trips.

Dr. Mason, who was the first physician to reach the appellee after his injury, testified as follows:

"Q. At that time did you know the plaintiff, T. M. Murphy? A. I knew him, but was not personally acquainted with him; I knew who he was.

Q. I will ask you to state to the jury whether or not on that occasion you saw Mr. Murphy? A. Yes, sir.

Q. What was his condition; describe it fully to the jury? A. He had a cut about three and one-half or four inches on the left side of the face, a cut on the nose and on the left side of the neck; he had another bruise over the hip and on the left side of the back; there were little cuts all over the body from glass.

Q. What did you do for him, Doctor—before that, however, did you ever make an examination to ascertain whether or not there were any fractures? A. Yes, sir.

Q. What did you find as to that? A. I think his nose was fractured, I think; I don't know what the X-Ray afterwards taken showed, but the cut on the side of the face I sewed that up immediately, took about nine or ten stitches at the time; the rest of the injuries I put on first aid and sent him on into the St. Joseph Infirmary in Louisville.

Q. Did you examine his ribs? A. Yes, sir.

Q. What condition were they in? A. Fractured; I don't know whether there was a complete separation or not.

Q. Which side? A. Left side.

Q. Did you examine his hip? A. Yes, sir.

Q. Did you examine the condition of his left hip and left leg? A. There were bruises over the left hip and back and left leg.

Q. Where was he taken, Doctor? A. St. Joseph Infirmary.

Q. Did you or not accompany him to the hospital? A. No, sir; I didn't go in with him, but went in my machine a little while afterwards.

Q. How often did you see him after that? A. I saw him twice after that with Dr. Abell.

Q. St. Joseph Infirmary, was it? A. Yes, sir.

Q. I would like for you, Doctor, to describe to the jury the suffering Mr. Murphy endured on account of his injury? A. The cut on the face was quite painful, extending in length nearly four inches, and the bruises over the body were quite painful, and there was a good deal of swelling on the left side of the body, on the left hip; he was suffering a great deal of pain when I saw him.

Q. What evidence of any shock did you observe? A. Well, the most pronounced probably was the excitement he was under there; there was a slight dilation of the left pupil when I saw him.

Q. What did that indicate, Doctor? A. Indicated that there was some jar or contusion to the spine.

Q. Doctor, did you prescribe anything, give him anything to relieve him? A. I gave him one-quarter of a grain of morphine and one-hundred and fiftieth of a grain of atropin to relieve the pain.

Q. Doctor, you went down to see him after he was at the hospital and saw him with Dr. Abell? A. Yes; twice.

Q. You have not seen him since to examine him? A. Not professionally."

Dr. Weidner testified as follows:

"Q. How long have you been acquainted with Mr. Murphy? A. Possibly about ten or fifteen years before this accident.

Q. Did you see him on May the third, 1917, at the St. Joseph Infirmary in Louisville? A. Yes, sir.

Q. I wish you would turn to the jury and tell the jury in what condition you found him? A. I saw him on May

third, 1917, some time in the morning, and we examined Mr. Murphy carefully at the time. I think present at the same occasion was Dr. Abell and Dr. Mason. I don't know whether anybody else was present or not; I think Dr. Henderson was present at one time. Mr. Murphy gave us the history of being or having been hurt in a railroad accident or street car accident, whichever it may be. We examined him. He was suffering of course in general from a shake up, and the objective symptoms were as follows: we found at the time that this man had cuts about the face and lip, bleeding of course, and slightly about the left ear; his back pained him a great deal and was very sore; and was very sore and stiff on pressure and manipulation. We diagnosed, we made a diagnosis of two ribs being broken on the left side, possibly the tenth and eleventh ribs; he had a broken nose; then he had an ugly semicircle or cut on the left side of his temple; this was quite an extensive injury and required attention by the surgeon and by a good many stitches at the time. In addition we noticed a loss of blood in the left ear. This is all I noticed and all my notes show about Mr. Murphy. I saw him afterwards with Dr. Abell until he left the hospital. I saw Mr. Murphy professionally again in December, I think the 20th of December, and really for the purpose of a re-examination; at the time he came to me and wanted to find out whether I could do anything for him; he was then suffering with stiffness and considerable pain in his back, that was the pronounced feature. His gait was hampered by this stiffness. I found him in pretty good shape except this loss of blood.

Q. Doctor, prior to May the third, 1917, state whether or not Mr. Murphy was a robust looking man or otherwise; active man in his business? A. I have always known him to be actively engaged in his business; that's the way I first met him.

Q. You had been his family physician, I believe? A. Yes, sir.

Q. Had you ever treated Mr. Murphy, that you remember of, Doctor. A. Yes.

Q. Do you remember what it was for? A. He had some trouble about his liver, gall, at the time; that's been many years ago; he had gotten a kind of catarrhal jaundice.

Q. He recovered from that? A. Yes.

Q. Assuming, Doctor, that at this time, May, 1919, Mr. Murphy still suffers pain, that he still has this stiffness

in his left hip, so that he is compelled to drag the left leg along and walk with a cane, assuming that that condition exists today, could you state whether or not his injuries were permanent that he received May the third, 1917, in this accident? A. If he is still in that fix, in that condition at the present time, I don't know how long it may last; if the injury received was long ago leaving marks, it will probably leave marks for a longer time.

Q. Along in his age, fifty-two years of age, what would you say about it? A. He is about one hundred and two the way he talks here this morning.

Q. Have you noticed any difference, Doctor, since this accident in his manner? A. More today than any time before; I noticed him being kind of sluggish; what it is due to, I don't know."

Dr. Pope testified as follows:

"Q. Were you called upon at any time to treat the plaintiff in this case, Mr. T. M. Murphy? If so, when, and tell the jury what condition you found him in? A. I first saw him on May the 18th, 1918, and gave him at that time a very careful and what I thought was a very thorough examination.

Q. State to the jury whether or not, Doctor, at that time he came to you for relief? A. Yes, sir; he applied to me for treatment.

Q. What did you find the matter with him? A. Well, at that time I found that he was suffering from a very considerable condition of shock of the nerves—let down; that he was very morbid and worried and fretted about matters; also there were visible evidences of injury; he had told me his condition and how the accident occurred. I found that he had on the left side of the skull, extending from the temple back towards the ear, a crescent-like scar of about three and one-half or four inches; he also had a scar upon his nose and one upon the back of his neck on the left side, all of which were loose, free and moveable scars; he had a broken nose, and there was a spot of tenderness and an enlargement to the last two ribs on the left side, just where they come out from the spine. I found the left leg fairly swollen; it was poorly moveable; he moved with difficulty at the left hip joint, and in my opinion he had probably at that time an inflammation of the nerves that supplied the left leg from the hip joint down to the toes. I found that what we call the sacro-iliac joints or joints between the lower part of the

spine and the great big hip bones, I found they had been wrenched or dislocated; they were fixed, especially the left one; there was a very plain and marked loss of hearing in the left ear to the ordinary physical tests. I make no claim to making any special knowledge of the tests of the ear, but to the ordinary tests of the voice at a distance and whisper there was a very marked loss of hearing. When we tested his blood we found it to be extremely thin; if I remember correctly he had a loss of 40 per cent. of the value of his blood; there was a very marked weakness of the heart muscles, and enlargement of the heart and a probable commencing trouble with one of the valves of the heart. That was what I found when I examined Mr. Murphy.

Q. Doctor, assuming that on May the third, 1917, Mr. Murphy, while a passenger on an interurban car, the car going at the rate of twenty or twenty-five or thirty miles an hour, jumped the track, and the car, the body of the car, struck a tree and overturned, and Mr. Murphy was pinned down by the debris from the wreck, would you say that the injuries which you found him to be suffering from on May the 18th, 1918, could or not have been reasonably attributable to that accident? A. Yes, sir.

Q. Doctor, going back to this injury to the hip, the sacro-iliac as you doctors describe it; how does that affect his walk or his ability to walk freely as a person who hasn't that trouble? A. It would make it difficult for a person to walk.

Q. State whether or not it is painful? A. Yes, sir; it is always painful.

Q. Have you examined Mr. Murphy and treated him since that first visit in May, 1918, for the purpose of trying to relieve him, Doctor? A. Yes, sir; I saw Mr. Murphy, I don't remember how many times, right after he consulted me in May, 1918, and then I have seen him several times since then, but I don't remember just how many times.

Q. When was the last time you examined him, Doctor? A. Day before yesterday.

Q. In company with whom? A. Dr. Harris.

Q. Dr. Harris representing the street car company? A. Yes, sir.

Q. What did you find his condition to be day before yesterday as compared with the condition you found in May, 1918, Doctor? A. As far as his general nervous

condition is concerned, I don't think there is very much difference, or there was very much difference; I think that the condition of the two ribs was somewhat better, I think they were less tender, less swollen; I think there was some less swelling at the left hip joint, and a very plain decrease in swelling in the left leg, and that neuritis was some better.

Q. What was the condition of his hearing as compared with that in 1918? A. Very much worse.

Q. How would that affect his general nervous condition, Doctor? A. Make it worse.

Q. Will you state whether or not, Dr. Pope, his injuries are permanent? A. I consider them to be permanent.

Q. Do you know of any treatment that medical science can give him to relieve those conditions? A. Having said I thought they were permanent, I do not think there are any treatments that will cure those conditions. His trouble can be ameliorated so that he can be made more comfortable, but in my opinion Mr. Murphy is damaged goods and he will remain that way the rest of his life."

Dr. Harris testified as follows:

"Q. Doctor, at the instance of the Louisville and Interurban Railroad Company did you make an examination of the plaintiff in this case, Mr. T. M. Murphy? A. I did.

Q. Where did you make that examination? A. I made it in the presence of Dr. Curran Pope, in his place of business.

Q. Where is Dr. Pope's place of business? A. On Chestnut street, in the city of Louisville.

Q. When did you make that examination? A. At two-thirty, on the 23rd of May.

Q. What kind of an examination did you make? A. I made a very thorough examination.

Q. Doctor, what evidence of injury did you find upon your examination, if any? A. Well, I found that Mr. Murphy had a scar over his left temple; I think it showed he had had some injury up above the left ear, over the temple; they had healed up very nicely; there was evidence that he had had an injury there, some little scar.

Q. Go ahead. A. He had a white scar on the side of his neck, about an inch long, running from before backwards, with evidence of a cut, a slight cut—the muscles were not cut, which he said he sustained in the accident that day I was examining him. I found on examining

Mr. Murphy that he had at some time in his former life sustained some injury which necessitated a partial amputation of his foot. He would not, however, let me look at his foot.

Q. Could you tell from his shoe how much of his foot had been amputated? A. Not positively; it looked to me like he had had what we call 'Coochart amputation of his toes.'

Q. Go ahead, Doctor. A. He also had sustained early in his life a fractured knee cap; had a big white scar over his knee cap, with a healing of the bone, but with a deformity of the bone.

Q. That was not caused from his injury, was it? A. No, sir. He claimed to have had two ribs, two fractured ribs on the left side, near the spine; he complained of some tenderness when I pressed over that region; his ribs had healed up; there was no crepitation. He also claims or complains of some tenderness over the sacro-iliac joint or connection between the sacrum and ilium, represented by this part of the back (witness indicating to the jury on his own back), the lower part of the back, there was no severe tenderness; he had no atrophy of the muscles; he had no evidence of a separation of the sacro-iliac joint.

Q. Was there any other evidence of any injury there, Doctor, except that he complained of some tenderness? A. No, sir; the examination was entirely subjective, symptoms were subjective.

Q. By subjective, what do you mean, Doctor? A. I mean that there was nothing that I could discover that revealed any injury except what he complained of. He seemed to have some difficulty in hearing on one side. I was not prepared in my examination to examine the—look at the ear drum; he told me that Dr. Pfingst had examined him for that; and that is as far as I went with that examination. However, I did try to ascertain what the trouble was in his ears, and looked at the records in Dr. Pfingst's office.

Q. As a matter of history, you did go and look at the records, did you Doctor? A. Yes, sir; I went to Dr. Pfingst's office and looked at the records.

Q. Did he tell you that he had been to Dr. Pfingst's? A. Yes, sir; he told me that he had been there, and I went there to see the records—I took his temperature.

By Mr. Lee:

Will you gentlemen (referring to counsel for the plaintiff)?

By Mr. Peak:

Yes, sir.

Q. What did the records disclose, Doctor?

Question objected to by Mr. R. F. Peak, of counsel for the plaintiff; objection sustained, to which ruling of the court the defendant by counsel excepted.

Q. Well, go ahead, Doctor. A. Mr. Murphy's temperature was normal when I examined him. I took his blood pressure; his systolic pressure was one hundred and twenty-five (125) millimeters of mercury; that means the power of his heart to squeeze the blood into his vessels; his diastolic pressure was sixty-five (65) millimeters of mercury; the difference between the two makes the remaining pressure in the blood vessels; that was sixty (60).

Q. What does all that indicate, Doctor? A. That means that it is pretty good for a man of his age, for the reason there is not any decided discrepancy between his systolic pressure and diastolic pressure at sixty-five (65) and his pulse pressure at sixty (60).

Q. Go ahead, Doctor. A. I examined his urine, and the urine reveals the fact that he is suffering from a slow form of interstitial nephritis.

Q. What is nephritis? A. It's what we commonly call Bright's disease; it is an inflammation of the kidneys.

Q. What organ does Bright's disease affect? A. Kidney. Special gravity of his urine was one thousand and eight (1008); it ought to be one thousand and twenty (1020); he had albumin present in small amounts, which to the physician is a pronounced and positive sign of degeneration in the kidney. He also has a heart lesion, known as the mitral lesion. This is an old lesion, in my opinion, and due from or rather to the possibly long continued intoxication of his system from his kidney.

Q. Was there any evidence of anything in his system to cause heart trouble, or nephritis, or kidney trouble? To what did you attribute that in your examination? A. Well, as I said before, I attributed his heart lesion to the slow intoxication of his body, and perhaps a long intoxication of his body from poisons within his body; that's the only way it is produced.

Q. Doctor, did Mr. Murphy walk with a limp when you saw him? A. Yes, he did.

Q. What caused that limp? A. Well, the only cause that I could find for his limp was that he had had a partial amputation of his foot; then he had an injury on the knee cap, an old injury, that probably had something to do with it.

Q. Was there any condition there of the hip that would cause him to limp or necessitate him using a walking stick? A. None that I could discover by a physical examination. I stripped him and looked him over. I tested him for mobility of his hip joints; should he have had any fixation of the hip joint he would have had a surgical condition known as laceration of the spine.

Q. From the history of his case that you had and from your examination, to what would you attribute the Bright's disease or nephritis which he has? A. Nephritis, known as interstitial nephritis, which he has, is generally that condition which arrives in the meridian or afternoon of life, due perhaps to over indulgence in the good things of life."

Dr. Abell testified as follows:

"Q. Dr. Abell, please state whether or not you are acquainted with Mr. Tom Murphy, the plaintiff in this case? A. Yes.

Q. Plaintiff claims that he was on the car on the third day of May, 1917, when it left the track at Anchorage and turned over and he was injured. State whether or not you treated him for said injuries. A. Yes.

Q. When did you first see him and where? A. I saw him on May 3rd, 1917, at St. Joseph's Infirmary, Louisville, Ky.

Q. What examination did you make, and what injuries did you discover? A. A careful physical examination was made; examination of urine was made, and X-Ray examination was made.

Q. Please describe as near as you can in detail the nature and character and extent of his injuries. A. Mr. Murphy presented multiple injuries to head and face. In left temple the skin and scalp were cut entirely through, the wounds extending three or four inches in length; nose was badly bruised and deformed, presenting cuts which extended through skin and underlying flesh. The lower lip presented a cut just above the skin. The remainder

of the head and face showed many bruises and contusions, into some of which dirt had been thoroughly ground. Both eyes were blackened by the effusion of blood in orbits. He suffered much pain in his back, left side and left hip, confining him to bed for some days. X-Ray examination failed to show any fracture of skull or any fracture about the pelvis or left hip; and as well as I remember two ribs were broken posteriorly on left side.

Q. How long did you treat him for his injuries at the infirmary? A. From May 3rd until May 16th.

Q. What progress or recovery did he make during that treatment? A. His progress was satisfactory, but even at the time he left the hospital he complained of pain in his left side and left hip.

Q. Did you treat him after he left the infirmary and went to his home? If so, how long? A. No.

Q. Please state the character of the recovery that he finally made when you ceased to treat him. A. I considered it satisfactory, particularly as there were no objective signs of injury to hip.

Q. State whether or not he had any injury to his hip, and if so, which hip, the nature and extent of such injury? A. Yes, left hip; which from exclusion of bone injuries by X-Ray, must have been of the nature of a sprain.

Q. State whether or not any of his injuries are permanent, and if so, state which injuries are permanent? A. I do not think so.

Q. Describe and state the nature and character of the injury to his head? A. See answer to question five (beginning 'Mr. Murphy presented multiple injuries to head and face.' . . .)

Q. State whether or not he had any shock or injury to the spinal cord, or to the brain? A. No, he presented no such symptoms at the time.

Q. What was the general condition of Murphy at the last time you examined him for treatment? A. Condition was fairly good, examination being made on May 16, 1917.

Q. What injury, if any, was done to his general nervous system? A. Such injury, if present, was purely a subjective one. Cross-interrogatories and answers.

Q. State whether or not the answers to the direct interrogatories are given by you from memory or from your records? A. These are given from memory assisted by the appended statement of mine of date of November 26, 1917.

Q. State whether or not the statements contained in the attached letter addressed by you to Mr. L. R. Curtis, dated November the 26th, 1917, fairly represent the condition of the plaintiff during the time he was under your care and treatment? A. Yes.

Q. Assuming that Mr. Murphy is still under the care of physicians and that he still suffers pain in his left hip and side, and assuming that he is still required to use a cane in walking, state whether or not in your opinion his injuries are permanent? A. Granting the assumption to be true, the condition must be a neuritis, which is an unusually obstinate condition to treat.

Q. Do you know how many times Mr. Murphy came to see you after he left the hospital and returned to his home? A. No.

Q. When was the last time you treated Mr. Murphy and what was his condition at that time? Did he suffer much pain, or any, on account of his injuries? State fully. A. I do not recall treating Mr. Murphy since he left the hospital, although I do recall distinctly that on two occasions he spoke to me about the pain in his side and hip."

Analyzing this evidence, we find that appellee was at the time of the accident fifty-one years of age, and that he had previous to that time suffered an injury which necessitated the amputation of two toes on his right foot; that in his youth he had suffered an injury to one of his knees, and that the scar therefrom still remained; that many years before he had suffered from liver trouble, and had trouble with his gall, and had had a kind of catarrhal jaundice, from which he had recovered; and it is suggested, but not shown by competent evidence, that prior to this injury he had consulted Dr. Pfingst about his left ear. It is likewise shown by the evidence of Dr. Harris that he had been for a number of years suffering from a form of nephritis or Bright's disease.

On the other hand, it is shown that as a result of this accident he had a broken nose, two fractured ribs on the left side, numerous cuts on his head and face and several bruises, particularly on his left hip. We have also evidence that he remained in the hospital only thirteen days; that his progress while there was satisfactory; that he was taken to his home at the end of that time; that in about six weeks he was able to go to his place of business in Louisville, several miles away, and that in three

months he was able to travel to New York alone and there transact important business.

Of the five physicians who testified, three of whom were of his own selection, one the emergency doctor sent for at the time of the accident, and the other selected by appellant, we find only one who was willing to say, or does say, that his injuries resulting from this accident are of a permanent nature. Another (Dr. Abell), who had charge of his case while he was in the hospital, says that in his opinion they were not permanent, and this opinion is concurred in by the doctor selected by appellant to examine him (Dr. Harris). Another (Dr. Weidner), who had been his family physician, apparently declines to commit himself as to whether the injuries were or were not permanent, and the emergency doctor was not specifically asked that question.

Taking the evidence of these five physicians as to the nature of his injuries, and considering in connection therewith the facts disclosed as to his physical ailments and injuries prior thereto, and considering along with these the further admitted facts that a short time after the injury he was able to and did drive his own automobile to and from the city of Louisville, a distance of several miles, and that in three months after the accident he went alone on a long journey to the city of New York and there transacted important business, it can not be said with any degree of assurance that the evidence is either clear or satisfactory that the injuries resulting from this accident were permanent, and especially when the uncontradicted evidence of Dr. Abell shows that the X-Ray taken shortly after the accident failed to show any fracture of the skull or any fracture about the pelvis or left hip, and it is the latter injury which is particularly claimed to have been permanent. *I. C. Ry. Co. v. Houchins*, 121 Ky. 526.

It is the rule in this state that when a verdict in a personal injury case is so large that it can not be sustained unless the injuries are permanent, there must be positive and satisfactory evidence of the permanency; the evidence must be clear and convincing as to that condition, and where it is not of that clear, positive and satisfactory nature, the verdict will be set aside as excessive. *Carter Coal Co. v. Dozier*, 170 Ky. 374; *I. C. Ry. Co. v. Houchins*, 121 Ky. 526; *I. C. Ry. Co. v. Basham*, 183 Ky. 439.

The evidence is not such as to carry with it that conviction which is generally incident to positive and satisfactory evidence, and we are constrained to hold that the verdict of \$15,000 is excessive.

But it is said for the appellee that the evidence shows he was a very prosperous business man and had an income from his business of from \$9,000 to \$30,000 a year, and that, as argued, he was compelled not only to give up this large and lucrative business because of his injuries received, but that he was compelled to and did sell his stock farm upon which he lived a few miles from Louisville.

Certainly a man's earning capacity should enter into and be considered in determining whether such a verdict is excessive, as well as whether he was compelled as a result of the accident to dispose of his business at a loss.

The appellee's evidence, however, does not disclose that he was compelled to give up his business in Louisville, or to sell his stock farm, because of this accident, or on account of his injuries received therein. He does state that in his Louisville business he had made from \$9,000 to \$30,000 a year, and that since the accident he had sold all of his mules, and that the business had dwindled away, and that he had sold his stock farm; but there is nothing in his evidence from which it may be fairly inferred that it was necessary for him to do so as a result of his injuries. It does not disclose that he sold his business or his farm, or either of them at a loss. He only says that he had not been able to attend to much business or do trading since the accident; but it is shown by the evidence that he had never exercised more than a supervisory authority over the Louisville business and his stock farm, and his own evidence discloses that since the accident he has been able to do the same, at least to some extent.

Upon the whole case we feel impelled to hold that, as the evidence as to the permanency of his injuries was unsatisfactory, and he has failed to show that he had any business loss as a result of this accident, the verdict was excessive.

The judgment is reversed, with directions to grant appellant a new trial.

Fleming v. Commonwealth.

(Decided March 8, 1921.)

**Appeal from Jefferson Circuit Court
(Criminal Division).**

1. **Criminal Law—Evidence—Appeal and Error.**—In a criminal trial, if there is evidence to support the verdict of the jury, and the verdict is not palpably against the weight of the evidence, it will not be disturbed upon the ground that it is contrary to the evidence.
2. **Criminal Law—Evidence—Question for Jury.**—In a criminal trial, the weight to be given to the testimony of the witnesses and the circumstances proven, are matters within the province of the jury, in determining what the facts were.
3. **Criminal Law—Imprisonment.**—Punishment by imprisonment, under the humane conditions prescribed by law, and not disproportionate to the enormity of the offense, in the opinions of reasonable men, is not a cruel punishment within the constitutional inhibition against the imposition of cruel punishment.

BRENT C. OVERSTREET for appellant.**CHAS. I. DAWSON**, Attorney General, and **C. W. LOGAN**, Assistant Attorney General, for appellee.**OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Affirming.**

The appellant, Mable Fleming, was indicted for the crime of murder, which was committed as charged in the indictment, by shooting and mortally wounding Ethel Thompson with a pistol, and from which shooting the victim died the following day. A trial resulted in her conviction of the crime of manslaughter and the fixing of her punishment at imprisonment for fifteen years. Her motion to set aside the verdict of the jury and to grant a new trial having been overruled, she has appealed from the judgment.

The grounds presented for setting aside the verdict of the jury, in the motion for the new trial were: First, the court misinstructed the jury; second, the verdict was against the law and the evidence; and third, the verdict was cruel and excessive. Counsel for appellant does not suggest any defect in the instructions, which the court gave to the jury. They fairly present the issues in the case without ambiguity, and are not susceptible of misapprehensions.

No complaint is made of any ruling of the court as to the admission or rejection of testimony, but it is insisted that the verdict is not supported by the evidence, but is flagrantly against it, and to determine the soundness of that contention it is necessary to consider the salient facts developed by the evidence. The appellant and her victim were females, and each between eighteen and twenty years of age, in the opinion of their acquaintances. A hostile feeling existed between them, which grew out of a rivalry for the affections of one of the males of the species, and which in this instance shows what gives color to the philosophy that the "female of the species is more deadly than the male." The victim was at the dwelling of one Mamie Smith, where she was a frequent visitor, and to which place the appellant claimed that she had been invited by the hostess to come on the same occasion, but when she arrived, riding upon a wagon with a friend, she discovered her enemy there and as she deposes, having been threatened by her on the previous evening, she thought, being unarmed, that it was not safe to stop, and therefore passed on to her own home, which was nearby, and where she secured her pistol, and then concluding to make a visit to the home of a grandparent, she carried the pistol with her. Whether the residence of Mamie Smith, where appellant had seen her enemy, was on the way from her own home to that of her grandparent does not appear, but in a very short time, she was observed by a neighbor to be standing in front of Mamie Smith's door, where Ethel Thompson, the victim of the homicide, then was, and where the appellant had seen her a few minutes previously. The appellant then seems to have abandoned her purpose to visit her grandparent, but stopped a short time in front of Mamie Smith's door, and then turned aside into the space in front of the house of the neighbor, just across the alley from the front of Mamie Smith's house, and therein engaged in a conversation with the neighbor. In a short time Ethel Thompson was observed to be sitting in the door of Mamie Smith's residence and appellant called to her saying, "If you don't like what I said, come out." Ethel arose and started toward the alley between them and about the same time appellant hurriedly returned to the alley and about the same time drew and began to discharge her pistol at Ethel who continued to advance, and the appellant be-

gan to retreat at the same time continuing to shoot, until at the fourth discharge of the pistol Ethel fell mortally wounded, and appellant then fled from the scene. One shot penetrated the outer side of the victim's left thigh, and the other penetrated her breast, and her clothing was set on fire from the near proximity to her of one or more discharges of the pistol. The three eye witnesses deposed that the victim of the homicide was not armed in any way and made no effort to strike the appellant with anything, but seemed to be attempting to grasp her with her hands. The appellant deposed that her victim was armed with a brown handled knife and was attempting to cut her with it, and did cut a gash in a blue middy, which she was wearing, and that when she fell after the fourth shot, Mamie Smith picked up the brown handled knife, which was near the body, and carried it away. This statement is denied by Mamie and she was corroborated in the denial by the other two eye-witnesses who deposed that the deceased had no knife, and that none was near her body after she fell. Mamie, also, deposed that she had not invited the appellant to her home on that occasion. A woman, at whose home the appellant was accustomed to spend a large portion of her time, deposed that on the evening previous to the homicide, in passing Ethel Thompson and others on the street, she overheard her say that she intended to stick a knife in appellant and turn it around, and that Mamie Smith came to her home and warned appellant that she had heard the Thompson girl say that she intended to "get her." This Mamie Smith, also, denied. A lad of fourteen years deposed that the Thompson girl, on the morning before she was killed, communicated to him when he met with her upon the street, that the appellant had "mistreated her and that she was going to get her." He also said that the deceased then had a brown handled knife in the pocket of her apron. It was, also, proven that the deceased went to her work upon the day she was killed, at about half past seven o'clock, and after working a short time, went away. Where the appellant was on that morning previous to the time, when, passing the house of Mamie Smith upon a wagon, she saw the deceased there, does not appear. The weight to be given to the statements of all the witnesses and the circumstances proven, was within the province of the jury, who saw and heard the witnesses

and the appellant in her own behalf. While the appellant insists, that she armed herself from fear of the deceased, because of the threats which deceased had made to do her violence, and when she shot her victim to death, did no more than she had a right to believe was reasonably necessary to protect herself from great bodily harm; the evidence easily supports the conclusion that the appellant moved by an ill-feeling, which was mutual to her and the deceased, seeing her at the house of Mamie Smith, immediately proceeded to her own home, armed herself with a pistol, and returned and sought out her victim for the purpose of engaging in a fight and doing her violence, and caused and brought on the fight and willingly engaged in it, and unnecessarily for her protection from serious injury, or when she believed that it was necessary for such protection, shot her adversary to death. A verdict is not against the evidence because the jury in its opinion gives credence to certain witnesses, and refuses to believe others. The jury is peculiarly qualified to determine facts where the evidence and circumstances are contradictory, and its verdict will not be disturbed, where there is evidence to support it and it is not palpably against the weight of the evidence. *Utterback v. Com.*, 190 Ky. 138; *Hall v. Com.*, 189 Ky. 72; *Warner v. Com.*, 184 Ky. 189; *Martin v. Com.*, 178 Ky. 439.

If the theory of the prosecution was accepted by the jury as the truth of the matter, the punishment imposed by the verdict was not excessive, and punishment by imprisonment under the humane conditions prescribed by law, for a period not disproportionate in the opinions of reasonable men to the enormity of the offense, can not be considered a cruel punishment within the meaning of the constitutional inhibition against the imposition of cruel punishments.

The judgment is therefore affirmed.

Commonwealth v. Wilson.

(Decided March 11, 1921.)

Appeal from Metcalfe Circuit Court.

1. False Pretenses—Indictment and Information.—An indictment accusing the defendant of the offense of procuring money or

property by fraudulent pretenses should specially aver the falsity of the pretenses alleged, it not being sufficient to aver only that the pretenses were false and known by the defendant to be so. The indictment should follow the rule required in indictments for perjury and false swearing in this respect.

2. False Pretenses—Competency of Wife to Testify Against Husband.—The wife of the defendant in an indictment accusing him of obtaining money or property under false pretenses is a competent witness against him where the property obtained is that of the wife, and the false pretenses were made while the husband was acting as agent for the wife, and consisted in misrepresenting the instructions which she had given him as her agent.

J. LEWIS WILLIAMS, Commonwealth's Attorney, JAMES TUDOR, County Attorney, and CHAS. I. DAWSON, Attorney General, for appellant.

V. H. BAIRD, M. O. SCOTT, D. B. STONE and J. W. KINNAIRD for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Certifying the law.

The appellee, F. W. Wilson, was indicted by the grand jury of Metcalfe county for "unlawfully and feloniously obtaining money from another by false pretenses," and upon his trial thereunder he was convicted and his punishment fixed at confinement in the penitentiary for two years. The court sustained his motion for a new trial and set the verdict aside and continued the case. The Commonwealth has appealed to this court, under the provisions of section 335 of the Criminal Code, for the purpose of having the law certified to the trial court. The order granting the new trial does not state the grounds which influenced the court to make it, but we gather from the briefs that the court was of the opinion that the indictment was defective in failing to expressly negative the facts which the defendant falsely represented and pretended to exist, and by means of which he accomplished the fraud, and that the allegation in the indictment that, "all of said representations and statements made as aforesaid were false and fraudulent and known to be false and fraudulent by the said F. W. Wilson when made by him," was not sufficient for that purpose. We think the new trial was authorized upon this ground.

In 8 Encyclopedia of Pleading and Practice, page 880, the text says: "While it is not necessary that an

indictment for obtaining goods by false pretenses should negative all the pretenses used, it is essential that it should negative such material pretenses as the prosecution expects to prove false, by such specific averment as will suffice to give the defendant notice of what he is to prepare to defend. Such averments of falsity should be as specific and distinct as in an assignment of perjury." And this court in the case of *Commonwealth v. Sanders*, 98 Ky. 12, held that the allegations of the indictment for this offense should be as direct and specific as is required in indictments for false swearing or perjury, in which last two offenses it is the settled rule that the falsity of the matters sworn to must be negatived by special averment. That case was followed by those of *Commonwealth v. Caldwell*, 121 S. W. (Ky.) 480, and *Commonwealth v. Nunnally*, 124 S. W. (Ky.) 313. In the *Nunnally* case, after referring to the others, the opinion said: "To allege that the statement was 'false' is not sufficient. The indictment should have charged that the mule was not the property of the accused, *Sidney Nunnally*." In that case the false pretense charged was that the defendant *Nunnally* falsely represented himself to be the owner of a certain mule, which representation induced the one defrauded to purchase it and to pay to the defendant the purchase price. Other cases follow the ones referred to and the rule of practice is now a settled one in this jurisdiction.

Another question presented by the record is, whether the wife of defendant, *Wilson*, who was divorced at the time of the trial, but not so at the time of the commission of the offense, was a competent witness to prove the falsity of the representations and pretenses made by the defendant and by means of which he accomplished his fraudulent purpose under the circumstances of the case? The facts, as disclosed by the record, are that *Mrs. Wilson*, before her marriage to the defendant, was the widow of a *Mr. Comer*, from whose estate she obtained \$600.00, which at the time of the commission of the offense was on deposit in her name in the *Peoples Bank of Metcalfe County at Edmonton, Kentucky*. She had married the defendant, who was a widower, but it does not appear that he had any children. On the occasion of the commission of the offense *Mrs. Wilson* desired to draw from her account in the bank the sum of \$50.00. Neither she nor her husband, the defendant, could write but each

could sign their names. She signed a blank check and directed defendant to have the cashier of the bank fill it out for \$50.00, and to pay to him for her that sum which he was to deliver to her, all of which he undertook to perform. Instead of having the cashier fill out the blank check he carried it to a merchant and procured it to be written to himself and for the entire amount of the deposit, \$600.00. He thereafter presented the check to the bank as thus written and verbally stated to the cashier at the time, after inquiry made, that his wife desired to check out the entire deposit, after which the cashier paid to him the amount of the check as he had procured it to be written. Upon his return home he gave to his wife only \$50.00 and represented to her that it was the only sum he had drawn from the bank, and she did not learn to the contrary until after the lapse of several days.

So much of section 606 of our Civil Code of Practice as bears upon the question involved says: "Neither a husband nor his wife shall testify while the marriage exists or afterwards concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper or a wrongdoer, and in such action either or both of them may testify; and, except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. (And except that when a husband or wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency.)"

This court in the case of *Commonwealth v. Sapp*, 90 Ky. 580, reviewed at some length the law upon the question of practice under consideration and held that the Code provision upon the subject was "but declaratory of the common law" and that "the rule that husband and wife can not testify for or against each other is subject necessarily to some exceptions, one of which is, where the husband commits or attempts to commit a crime against the person of the wife." In that case the husband was indicted for an attempt to poison his wife and it was held that she was competent to testify as to his conduct, which she observed during his preparation to

commit the crime. Subsequent cases, which it is not necessary for our present purpose to cite, follow the rule laid down in that case. The Code provisions in existence at the time of that opinion were practically the same as the present section 606, *supra*, except the legislature in 1898 amended it by adding the independent clause (now in parenthesis), saying: "And except that when the husband or wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency." The exception permitting the wife to testify in a criminal prosecution against her husband for an offense or an attempted offense against her person is in direct conflict with the express statement of the section of the Code, saying: "Nor shall either of them testify against the other," which was also the common law rule; but the exception was created and is allowed from the necessities of the case in order to subserve the larger policy of the state, that the guilty should be punished, which would in many cases be defeated if the mouth of the wife was closed and she was not permitted to testify to the facts constituting the offense against her person. Indeed it is stated in the Sapp case that, "The policy (under the common law as well as under the statute) upon which the rule that the husband or wife can not testify against each other, is based, is so far overcome as to create the exception by that superior policy which dictates the punishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity." The opinion continues and holds that notwithstanding the positive language of the section forbidding a husband or wife to testify against each other, the exception under consideration prevailed. It is insisted that, upon equally sound reasoning, the same superior policy of the state which dictated the exception to the rule there under consideration, would also dictate another one to the effect that either spouse might testify against the other upon a criminal charge where the offense was directed against the property of the offered witness. But, we do not feel it incumbent upon us to determine the question in this opinion, since we have concluded that for another reason, to be hereinafter noticed, in connection with the fact that defendant's crime was directed against the wife's property, she was a competent witness to testify

in this case as to the falsity of the pretenses alleged in the indictment.

The Sapp case, *supra*, is also reported in 29 American State Reports, 405, and following the opinion there is an extended note by Mr. Freeman, the annotator, discussing the doctrine of privileged communications between husband and wife. On page 420 of that volume, it is said: "The rule is well established, that when a wife acts as agent for her husband, or the husband acts as agent for his wife, either may testify to the acts or communications within the scope of such agency in any case in which such acts or communications are involved, and this, whether either spouse is a party or not, and whether the evidence makes against either or not as the case may be. This rule prevails generally, with, so far as we have been able to find, one exception, notwithstanding the general rule that all acts and communications between husband and wife during the existence of the marriage relation, and made while they are alone, are privileged, and cannot be disclosed in testimony by either." Among the numerous cases cited in support of the statement are those of Darrier v. Darrier, 58 Mo. 222; Southwick v. Southwick, 49 N. Y. 510, and Stickney v. Stickney, 131 U. S. 227. Other cases from the appellate courts of a number of states are referred to, and the only court holding to the contrary is the Massachusetts Supreme Court in the case (cited by Mr. Freeman) of Commonwealth v. Haynes, 145 Mass. 289, which was decided in 1887; but the same court, to some extent at least, narrowed that opinion in the later case of Nichols v. Rosenfeld, 181 Mass. 522, decided in 1902, after the annotation was written. See also to the same effect 40 Cyc. 2355-2356. Under this exception to the general rule, as it existed at common law, it is competent, as will be seen in the annotated note, *supra*, to prove by either spouse not only the conversations and acts relating to the agency and connected therewith, but also the fact of agency.

In the Darrier case, *supra*, the husband wrote to his wife to purchase certain land for him. She made the purchase but in violation of his instructions she took the title in her name and afterwards claimed the property as hers. The husband instituted some kind of a proceeding against her to correct the deed and at the trial offered his letter containing his instructions to her as evidence.

The trial court rejected it, but the Supreme Court of the state, on appeal, held that the letter was competent although a communication between husband and wife, upon the ground that it concerned the relationship of agency between the husband and the wife.

The Southwick case was an action by the wife against her husband to recover an alleged balance of money in his hands which she claimed belonged to her as her separate estate and which her husband had received as her agent. The appellate court held that each party might testify as to the matters touching the agency, saying: "But there is nothing of the nature of confidential or privileged communications in the matters here proved. They are the commonplaces of business and of every day affairs, and such as pass hourly from a principal to his agent or purse-bearer, and were the same as would have been made by the plaintiff to any other person, her agent."

If at common law it was competent for either spouse to testify against the other concerning matters relating to an agency existing between them (under the interpreted exception now under consideration), for a still greater reason would they be competent to testify as to such matters under the express exception to that effect enacted by our legislature, as we have seen, in 1898, and now a part of section 606, *supra*, of the Code. By parity of reasoning, if the common law public policy which excludes altogether communications between husband and wife, shall surrender to the exception now under consideration, where only private rights are involved, *a fortiori* should our public policy, as declared in section 606 of our Code, surrender to our also (statutory) declared exception in criminal prosecutions, where public rights are involved, and where all members of society are interested in procuring the punishment of the guilty, and where the state is interested in having its criminal laws, enacted for the benefit of society, enforced. There might possibly be some ground for hesitation in applying this exception to the general rule in those criminal cases where the crime with which the defendant is charged was not aimed at, or in any wise involved, the property of the other spouse; but where, as in this case, the alleged offense of the defendant was one against the property of the wife and was committed while he was acting as agent for her, we entertain no doubt but that the wife

may testify as to the authority and the instructions which she gave him and which he promised to obey.

We would not be understood as announcing a principle applicable to criminal prosecutions generally, but confine the opinion to facts and circumstances similar to those appearing in this case.

We find no other questions either presented by the record or argued in briefs sufficiently meritorious to require discussion. Wherefore this opinion is certified to the trial court as the law of the case.

Crick, County Judge, et al. v. Rash.

(Decided March 11, 1921.)

Appeal from Hopkins Circuit court.

1. **Counties—Elections—Proceedings Preliminary to Issue of Bonds.**—In elections called and held under the provisions of section 157a of the Constitution, the election may be called at the first regular term of the court after the filing or lodging of the petition asking therefor with the county judge, and if filed on that day it is competent for the election to be called at that term; nor is it necessary to the validity of the election that the proposition voted on should receive two-thirds of the votes cast in that election, since a majority of the votes is sufficient to carry the proposition. Neither is it necessary for such an election to be held on the regularly provided election day for the election of officers, since it may be held on any day fixed in the order calling it if the requisite notice is given.
2. **Counties—Proceedings Preliminary to Issue of Bonds.—Orders** made by the fiscal court after such an election, looking to the preparing, executing and selling of the bonds and to the custody, handling of, and expending the proceeds, are legislative in their nature and may be rescinded or modified at a subsequent term of the court.
3. **Counties—Duty of Fiscal Court in Sale of Bonds.**—Under section 4307 of the statute it is the duty of the fiscal court to sell the bonds voted at such an election for not less than par and accrued interest and all of the proceeds arising therefrom must be used for the purposes for which the bonds were voted.
4. **Counties—Fiscal Courts—Powers of.**—Fiscal courts possess only such power and authority as are expressly conferred upon them by law and such other powers by implication as are imperatively necessary in order to carry out their conferred express authority.
5. **Counties—Fiscal Courts—Sale of Bonds—Commissions.**—Fiscal courts, therefore, by implication have the authority to employ

brokers and pay them reasonable commissions to effect a sale of road bonds voted by the electors of the county pursuant to the section of the Constitution referred to, after it has made unsuccessful bona fide efforts to, itself, make the sale; but even in that case the fiscal courts possess no authority to contract or agree for the payment of a commission greater than is ordinarily and usually charged for similar services in transactions between individuals; and where the contract agrees to pay a commission of 5% on the gross amount realized, when the customary charge for similar services between individuals is far less than the compensation agreed upon, the execution of the contract will be enjoined in a proper action filed for the purpose.

6. States—Limitation of Amount of Indebtedness or Expenditure.—Section 49 of the Constitution forbids the General Assembly from contracting debts, except for the purpose of meeting deficits or fallures in the revenue, for which purposes debts direct or contingent, singly or in the aggregate to the amount of \$500,000.00 may be contracted, but the moneys arising therefrom shall be applied only to the purpose or purposes for which they are obtained or to repay the debt or debts so contracted.
7. States—Limitation of Amount of Indebtedness or Expenditure.—Section 50 of the same instrument forbids the contracting of any debt by the General Assembly, or it authorizing the contracting of any debt, except for the purposes stated in section 49, without making provision at the time for the collection of an annual tax sufficient to pay the interest and to discharge the debt within thirty years, and that before the act shall take effect it shall be submitted to the people of the state at an election and receive a majority of the votes cast therein.
8. States—Limitation of Amount of Indebtedness or Expenditure.—A debt within the meaning of the constitutional provisions, is any obligation to pay money on the part of the state at some fixed future time, or a time which may become definite and fixed by act of either party and which act they expressly or impliedly agree to perform in the contract creating the debt; but the inhibitions of the constitutional provisions do not apply to, or include debts so contracted in anticipation of and which may be paid out of, the revenues of the state already levied or to be collected for the fiscal year in which the contract is made; nor to a debt so contracted to be paid out of revenue already in the treasury for the purpose; nor to a debt to be paid out of a special fund, provided such special fund is not and never becomes the property of the state; but it is not competent for the legislature to indirectly evade the constitutional provisions under the latter rule, by providing that the debt shall be paid out of a specially designated fund insufficient at the time and which itself is a part of the revenues of the state and which is collected under the authority of the legislature to levy and collect taxes.
9. States—Limitation of Amount of Indebtedness or Expenditure—Loans by Counties.—The loans or advancements by the various

- counties of the state to the Commonwealth under the provisions of section 11 of chapter 17, Acts 1920, page 76, constitute debts of the state within the meaning of the two sections of the Constitution referred to, and if such debts in the aggregate, together with other outstanding obligations of the state, may not be met or paid by anticipating the revenues of the state for the year or with money in the treasury available for road purposes, or out of any special fund, as above defined, they are prohibited by said sections of the Constitution and are void.
10. States—Aid to Counties for Construction of Roads.—Section 157a of the Constitution did not in any manner repeal either section 49 or section 50 of that instrument so as to authorize the state to contract debts with the counties to an unlimited amount for the purpose of constructing roads. The only effect of the newly adopted section was to permit the state to extend to the counties its credit for the construction of roads, but which credit was only such as the Constitution allowed and which it could not extend to the counties for that particular purpose (section 177, Constitution) before the adoption of section 157a.

CHARLES I. DAWSON, Attorney General, W. T. FOWLER, Assistant Attorney General, HOBSON & HOBSON and LETCHER R. FOX for appellants.

J. F. GORDON, M. K. GORDON, CHAS. G. FRANKLIN, V. Y. MOORE and W. H. YOST for appellee.

GEORGE B. WINSLOW and JOHN B. HOWE, *Amicus Curiae*.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming in part and reversing in part.

The appellant Crick (one of the defendants below) is the county judge of Hopkins county, and he and the other appellants, who were also defendants below, as members of the fiscal court of the county, with other officers and persons deemed necessary parties, were sued below in this action by the appellee and plaintiff below, James R. Rash, a citizen and taxpayer of the county, to obtain an injunction restraining defendants from issuing, selling or disposing of any part of a \$500,000.00 road bond issue which had been authorized by an election in the county wherein a majority of the voters endorsed the proposition, upon the alleged grounds of, (1) irregularities in calling the election, (which was held under the provisions of section 157a of the Constitution) and (2) because of alleged fatal irregularities in the orders of the fiscal court made and entered after the election. A further injunction was asked restraining

the fiscal court from carrying into execution a contract which it had entered into of record with Caldwell & Company, a firm of brokers in Nashville, Tennessee, wherein the fiscal court agreed to pay the firm 5% commission for the sale by it, at par with accrued interest, of \$200,000.00 of the proposed bonds, the commission to be paid out of the general funds of the county and not from the proceeds of the sale; and the fiscal court was also asked to be enjoined from turning over, advancing or lending to the state highway commission, as an agent of the Commonwealth, and for the use and benefit of the latter, any part of the proceeds of the bond issue which the fiscal court had proposed and offered to do to the extent of \$150,000.00, as provided in section 11 of chapter 17, Acts 1920, page 76, which section will be later referred to and such parts thereof as are pertinent to the questions raised will be inserted in this opinion. A demurrer was filed to the petition by defendants which the court overruled and they declining to plead further the court sustained the motion for the injunction *in toto* and granted to plaintiff all the relief he asked, and this appeal calls in question the soundness of that judgment.

We could, with propriety, dismiss all of the objections to the validity of the election and to the orders of the fiscal court made thereafter as alleged and relied on in the petition under grounds (1) and (2) above, since none of them is even mentioned by counsel for appellee in their brief, much less are they relied on for a reversal of the judgment, and it would therefore appear that each of them is abandoned on this appeal, if indeed, they were ever urged with serious earnestness. As alleged in the petition, they are numerous, under each of the numbered grounds, (1) and (2), and most of them are so highly technical as to demonstrate their immateriality. The principal objections as to the validity of the election under ground (1), are: (a) That the petition signed by the requisite number of citizens asking for an order by the county judge calling the election was not filed at a regular term of the county court, nor did it lie over from one term of that court till the next one before the election was called; (b) that the election was not held upon the regular November election day but on a special day named in the order; (c) that the proposition to issue the bonds received on the day of the election only a majority of the votes cast therein and not two-thirds there-

of, as plaintiff claims was necessary, and (d) that the petition asked for an issue of the bonds "for the purpose of building roads *and bridges*," while the order of the court calling the election stated that the money raised from the sale of the bonds should be used for the construction or reconstruction of roads, omitting the use of the word "bridges." As heretofore stated, many other objections, equally as unmeritorious as the one last mentioned, are stated in the petition, and to undertake to set out and dispose of each of them could not possibly be of any service to any one and would lengthen this opinion far beyond proper limitations. Objection (d) might be effectually answered by saying that enough appears in the order calling the election to show that the intention was to use the proceeds of the bonds, if voted, in constructing or reconstructing "roads *and bridges*;" but if the word "bridges" was not referred to therein it would be construed to be included in the term "roads," so that, when the court in calling the election directed that the proceeds of the bonds to be voted should be used for the purpose of constructing or reconstructing roads, *bridges* were necessarily included. Objection (c) has been denied by this court in a number of cases, some of the latest of which are: *Cleary v. Pieper*, 169 Ky. 434; *Huston v. Boltz*, *idem*, 640; *Denton v. Pulaski County*, 170 Ky. 33; and *Armstrong v. Fiscal Court of Carter County*, 169 Ky. 433, wherein this court held that an election for the issual of road bonds, held under the authority conferred by section 157a of the Constitution, did not require more than a majority of the votes cast upon the proposition in order to confer the authority upon the fiscal court to issue them, and that it was not necessary for the proposition to receive two-thirds of the votes cast as is required in elections held under section 157 of that instrument. That objections (a) and (b) are without merit is shown by this court's opinions in the cases of *Walsh v. Asher*, 163 Ky. 379; *Albright v. Ballard*, 164 Ky. 768; *Finley v. Rose*, 165 Ky. 408, and *Bowman v. Fayette County*, 168 Ky. 524.

Under ground (2) relied on in the petition in support of the injunction, the principal objection is that the fiscal court changed its orders a number of times after the entry of a prior one and after the adjournment of the court, which orders related to various admin-

istrative matters pertaining to the sale of the bonds, such as the appointment of commissioners for the handling of the proceeds, the roads upon which such proceeds or portions thereof should be expended, and other matters of similar nature. It is insisted that the fiscal court being one of record had no jurisdiction to change any of such orders after they had been made and after the term of court at which they were made was adjourned. But a sufficient answer to all this is that in the case of *Commonwealth v. Beauchamp*, 136 Ky. 227; *Crittenden County Court v. Shanks*, 80 Ky. 475, and *Scott v. Forrest*, 174 Ky. 672, we held that the orders of the fiscal court as are here involved were legislative in their nature rather than judicial and that they were subject to be revoked, modified or altered at a subsequent term of the court, provided such modification, alteration or renunciation did not affect previously acquired rights of any one who acted upon the faith of their original entry.

The objections referred to are the only ones urged against the validity of the issuance of the bonds, even remotely or faintly possessing merit; from which it results that the court erred in overruling the demurrer to that part of the petition seeking to enjoin the fiscal court from issuing the bonds pursuant to the election, and the injunction to that extent should not have been granted.

This brings us to a consideration of that part of the petition seeking to enjoin the fiscal court and Caldwell & Company from executing or carrying out in any manner or to any extent, the contract for the sale of \$200,000.00 of the voted bonds for a commission of 5% of the gross proceeds of the sale, to be paid out of the general funds of the county. The rule, universally applicable to, and circumscribing the power and authority of fiscal courts, and other governing authorities of counties, is that they can exercise no power or authority which is not expressly conferred upon them by the Constitution or a statute, and such implied powers as are imperatively necessary to execute those so expressly conferred. This rule applicable to the powers and authority to such subdivisions of the state is so thoroughly fixed in the jurisprudence of this country as that we scarcely deem it necessary to fortify the statement with authorities. Some of the later cases from this court sup-

porting the doctrine are: *Breathitt County v. Hammonds*, 150 Ky. 502, 42 L. R. A. (N. S.) 836; *Ann. Cas.* 1914D, 514; *Russell County v. Hill*, 164 Ky. 360; *Mills v. Lantrip*, 170 Ky. 81, and *Riddell v. Boone County*, 183 Ky. 77. Section 4307 of the Kentucky Statutes, 1915 edition, prescribes that the character of bonds involved in this case shall be issued and sold from time to time by the fiscal court, i. e., the duty is imposed by that section on the fiscal court not only to issue such bonds, but to sell them after they are issued. It is insisted, however, that neither the county judge nor any other member of the court is required by that section to perform such duties in person, but that they impliedly have the authority to employ others to perform them, and we are not prepared to say that under certain circumstances and conditions this may not be true. The same section also provides, "That all the money raised by the sale of bonds shall be used solely and alone for the building, construction or reconstruction of roads," etc. It is therefore, insisted by the plaintiff that this requirement forbids the payment of any part of the proceeds of the sale as commissions or expenses in effecting it, and that it is incompetent for the fiscal court to violate that requirement by resorting to the subterfuge of paying such commissions or expenses out of the general funds of the county, as was attempted to be done in this case. We are not inclined to give to the above quoted requirement of section 4307 such a strict and literal interpretation as would deprive the fiscal court of the authority to incur such expenses as are absolutely necessary in order to effect a sale of the bonds, and which are incurred in carrying out the general scheme and plan for which the election was held. Rather are we inclined to hold that it was the intention of the legislature in enacting that provision to restrain the fiscal court from applying any of the proceeds of the sale of the bonds referred to, to any other purpose than that for which the bonds were voted. To hold otherwise would prevent the fiscal court from paying the expenses of the election, the court costs and fees incident to calling it and for making the necessary orders carrying out the purpose of the election, the printing and engraving of the bonds, and other absolutely essential and necessary acts for the acceptance by the voters of the rights and privileges conferred by the legislature in authorizing the election. Any expenses,

therefore, coming within the general class referred to may be legally paid by the fiscal court out of the gross proceeds of the sale of the bonds, but any which do not come within that general class may not be so paid; nor do we think it competent for the fiscal court to endeavor to circumvent the meaning of the statutes by directing such unauthorized payments to be made out of the general funds of the county. Such action is manifestly the barest sort of subterfuge. The effect of it would be to make the taxpayers of the county pay them out of one pocket when the fiscal court has no authority to require them to be paid out of the other one. The rule that the substance shall be looked to rather than the shadow forbids such circumlocution and we do not, therefore, attach any importance to that part of the order of the fiscal court now under consideration, directing that the commissions to Caldwell & Company shall be paid out of the general funds of the county and not from the proceeds of the sale of the bonds. But, it does not necessarily follow that the fiscal court under certain circumstances and emergencies would not be authorized, under its specific authority to sell the bonds, to pay a reasonable and customary commission to agents or brokers who may be engaged to effect the sale. We are cited by counsel for the fiscal court to the cases of *Church v. Hadley*, 145 S. W. 8, 240 Missouri 680; *State v. Duluth Land Co.*, 75 Minn. 456; *Paul v. Seattle*, 40 Wash. 294; *Manitou v. First National Bank*, 37 Colo. 344; *Davis v. San Antonio*, 160 S. W. (Texas) 1161; *Koochinching Co. v. Elder*, 176 N. W. 195 (Minnesota, decided Feb. 6, 1920); *Hunt v. Fawcett*, 8 Wash. 396; *Uhler v. Olympia*, 87 Wash. 1, and *Smith v. County of Los Angeles*, 99 Cal. 28, in support of the right of the fiscal court to carry out the contract with Caldwell & Company in this case, and it must be admitted that at least some of the cases referred to recognize the validity of such a contract, notwithstanding the existence of statutory limitations on the power and authority of the fiscal court in such matters such as prevail with us. But in others of the cases the court construed the local statutes to confer such authority. We do not deem it necessary to review those cases, or to differentiate the facts of those opinions, in so far as they are different from those presented here, because we do not find ourselves able to agree with the doctrine announced in some of them upholding the right

of fiscal courts, under circumstances similar to those here presented, because of implied authority, to employ brokers for the purpose of selling municipal bonds for an agreed compensation largely in excess of the usual and customary charges for such services, and that, too, without its being demonstrated that the fiscal authority had in good faith made unsuccessful efforts to effect a sale. In the instant case the fiscal court had advertised a time and place for the sale of the bonds of Hopkins county on at least two different occasions. The advertisement was, not only locally circulated in newspapers and by handbills, but it was inserted in periodicals of wide circulation and devoted exclusively to the business of advertising for the buying and selling municipal bonds. On neither of the occasions was there a purchaser who offered par and accrued interest for any of the bonds, which was the least price, under the statute, that the fiscal court could accept. Under those circumstances we think the implied authority exists for the fiscal court to employ commissioners or brokers to make the sale of such an amount of the bonds as are immediately needed, provided the agreed commission should not exceed that which is usually and ordinarily charged, at the time, for similar services in similar transactions between individuals. We know, as a part of the current history of the country, that at the time the contract with Caldwell & Company was entered into brokerage commissions for the services proposed to be rendered by that firm to Hopkins county were about $\frac{1}{8}$ of one per cent. The agreed commission, therefore, of 5% for the amount of bonds proposed to be sold by Caldwell & Company was grossly excessive. In conferring "necessarily implied" authority upon such bodies as fiscal courts it should be limited so as to require them when acting for the public to be guided by such economical considerations as govern similar transactions in the commercial world between individuals. To sanction a contract like the one here involved would open the door for the perpetration of fraud by prospective bidders and render it possible for them to enter into a collusive agreement or conspiracy to decline to make or offer bids, either privately or at the publicly advertised sale, in the hope of procuring a discount by obtaining a contract for exorbitant commissions to be divided, perhaps, between

or among the parties to the agreement and who might also share a division of the bonds when purchased. To uphold the contract would pave the way, and open opportunities for the gratification of the already too prevalent desire to commit graft wherever and whenever possible upon the public treasury. If such an opportunity is to be extended we prefer that there should be more explicit authority for it than what we find in our statute. What has been said, however, will not prevent a fiscal court, or the body whose duty it is to sell the bonds, after making *bona fide* efforts to do so without success, from agreeing to pay a reasonable commission for the services, to be measured as heretofore indicated. Nor is it intended by anything said herein to reflect upon any of the members of the Hopkins county fiscal court in entering into the contract with Caldwell & Company, since the record thoroughly demonstrates that they acted under the *bona fide* belief that they possessed the authority to do so, and that the contract was for the best interest of the people of the county. On this branch of the case it is our conclusion, based upon the reasons stated, that the judgment appealed from properly enjoined the execution of the contract as made with Caldwell & Company.

This brings us to the last, as well as the most serious, question involved in the case, which is the power or authority of the fiscal court to advance or loan to the state \$150,000.00 of the proceeds of the bonds. The record, as made up in the court below, was not in condition to technically present the question, since some necessary facts for its determination were not included therein. But the Commonwealth, by agreement of parties, has come into the case, and an agreed stipulation to which it is a party has been made part of the record, which stipulation contains the omitted facts, and we have concluded, because of the importance and public nature of the case, and at the earnest solicitation of all parties concerned, to treat the record as formally made up and to dispose of the question presented.

It is claimed that the authority of the fiscal court to lend or advance the \$150,000.00 to the state is contained in that portion of section 11 of the 1920 act, *supra*, saying:

"If any county desires to construct any part of any primary road before the state may construct same under

the plan and system herein designated, such county shall make request of the state highway commission so to do. When such request is made, the state highway commission shall immediately investigate such request, and, if they find that the county has funds available to construct any part of such road, and will pay for the construction thereof, the state highway commission may take up immediately the construction of such road, but they shall not do so until the county has taken such steps as they may require to make available subject to their order sufficient funds to pay for the construction of such road. When the county has satisfied these requirements, the state highway commission may proceed to construct such road in the same way and manner, under the same regulations that they construct other roads as herein provided. They shall keep careful account of the money thus advanced by the county to the state, and when the project of which such road is a part shall have been completed, the state shall refund to the county the full amount of money thus advanced upon proper certification of the state highway commission."

Prior to the passage of that act there was in operation in this state what was generally known as the "State aid" road plan. The roads in the various counties, built under that plan, were strictly county roads to the construction of which both the state and county contributed.

The 1920 act in its first four sections authorized the state highway commission, which the act created, to carry out all contracts which had been entered into under the state aid plan, or which might be entered into under it on or before July 1, 1920, and authorized the commission to bind the state for its part of the cost of construction of such roads under contracts entered into up to that time. Beginning with section 5 of the act an entirely new scheme on the part of the state for the construction, reconstruction and maintenance of roads was enacted. That scheme was to divide the entire state into "Road Projects" (about seventy in number) and other parts of the act provided that all the roads constituting any part of any of the "projects" should be strictly and exclusively state roads, for neither the construction nor the maintenance of which the counties were responsible. On the contrary, the maintenance of them, after they were constructed, was imposed "entirely upon the state." In section 9 of the act it is provided in substance

that the state highway commission shall begin the construction of the various projects and prosecute the work "as rapidly as finances are available for that purpose, due regard being given to the maintenance of roads built during preceding years under state aid or otherwise which have been incorporated in this system of state highways or which have been constructed under this act." The "finances available for that purpose," as used in the section, necessarily refer to finances which are constitutionally available, as hereinafter shown, since the legislature could not authorize the state highway commission to make "available" finances by creating a debt upon the state contrary to the provisions of the Constitution as judicially interpreted; and, whether the latter is or may be done, under section 11 of the act, is the question presented for determination.

There can be no reasonable doubt that the purpose of the legislature, in incorporating in the act the quoted portion of section 11 above, was to provide a method by which the construction of the state highways, provided for in the act, might be facilitated and the roads built before the state or its highway commission could procure or become possessed of immediate "finances available for that purpose" from the general revenues of the state, whether they were specifically set apart to the road fund or not; otherwise there would have been no necessity in permitting the state to construct the road with money belonging to the county, since if there was in the state treasury available funds for the purpose there would be no occasion for obtaining those funds from the respective counties.

Section 49 of the Constitution authorizes the general assembly to contract debts to meet casual deficits or failures in the revenues, but limits the amount of such indebtedness, even for that purpose, and whether directly or contingently contracted, either singly or in the aggregate, to the sum of \$500,000.00. And, it furthermore provides that the proceeds of loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, which is "casual deficits or failures in the revenue." The following section (50) says:

"No act of the general assembly shall authorize any debt to be contracted on behalf of the Commonwealth except for the purposes mentioned in section forty-nine,

unless provision be made therein to levy and collect an annual tax sufficient to pay the interest stipulated, and to discharge the debt within thirty years; nor shall such act take effect until it shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it; provided, the general assembly may contract debts by borrowing money to pay any part of the debt of the state, without submission to the people and without making provision in the act authorizing the same for a tax to discharge the debt so contracted, or the interest thereon."

So, the first question to be determined is whether the authorized advancement to the state by the various counties therein of funds for the construction of roads, as provided by section 11 of the 1920 act, is the creation by the state of a debt, as is contemplated by section 50 of the Constitution. The rule for the interpretation of constitutions, as universally applied, is that the language therein is to receive its plain and ordinarily understood meaning by the generality of the people. Constitutions are many times actually, and always in theory, adopted by the people and their language is presumed to contain the meaning which the people generally attribute to the words employed. In this respect the rules for the interpretation of constitutions differ from the ones applied in the construction of statutes. *Lake County v. Rollins*, 130 U. S. 662, and notes on page 232, 44 American State Reports.

Guided by this rule and the authorities hereafter considered, there is no room to doubt that the obligations, which the state incurs through its state highway commission to the respective counties, which may advance to it money or funds for the construction of the highways provided for in the 1920 act, create both in fact and in law "debts" on the part of the state to the extent of the sums so advanced; but whether they are such as is forbidden by the Constitution must be determined upon other facts to be hereafter considered. In 1 Bouvier's Law Dictionary, title "Debt," it is said: "There is no doubt of the meaning of the word 'debt' as used in the law. It means 'something owed;' 'something due or to become due upon express or implied agreement.'" In the case of *Brashear v. Madison*, 142 Ind. 685, 33 L. R. A. 474, it is said: "No good reason, however, has been

advanced to show that the word (debt or indebtedness) in this connection (in the Constitution) should have any other than its ordinary signification, that is, the contraction of an obligation for which there is no present means of payment." The question is extensively dealt with and completely covered in lengthy annotations to the cases of *Ottumwa v. City Water Supply Co.*, 59 L. R. A. 604, 109 Fed. 315; *Superior Manufacturing Co. v. School District Number 63*, 37 L. R. A. (N. S.) 1054, 28 Okla. 293, and *Anderson v. International School District Number 5*, 1917 E. L. R. A. 428, 32 N. D. 413.

In 25 R. C. L. 398, the text says:

"The phrase 'shall never contract any indebtedness,' as used in state constitutions, limiting the amount of indebtedness which a state may lawfully contract, includes, any obligation which the state undertakes or is obligated to pay or discharge out of future appropriations; that is, appropriations not made by the legislature creating the debt or obligation, and to be paid from moneys to be derived from levies other than those made by the then existing legislature, which must necessarily be raised by levying a tax upon the property of the entire state, as distinguished from a mere city, county or district levy." And in vol. 19 of the same work, page 979, in defining the word "indebtedness" used in constitutions and as applicable to the obligations of municipalities, the text says:

"Under a constitutional provision that no municipality shall incur an indebtedness beyond a certain amount the word 'indebtedness' should be given its ordinary signification, that is, the contraction of an obligation for which there is no present means of payment, and it is not confined to obligations in the form of bonds or other written evidences of indebtedness or having their origin in loans, but includes every indebtedness arising upon contract whether express or implied."

See also notes to the case of *Beard v. City of Hopkinsville* in 44 Amer. St. Rep., page 230, the case reported on page 222. In the note referred to is this statement: "The word (debt or indebtedness) is to be given its fair and legitimate meaning, and not restricted to obligations in the form of bonds and other written evidence of indebtedness. (Citing cases.) So far as any general definition may be given, it may be said that every indebtedness arising upon contract, whether express or

implied, and by virtue of which a city is under obligation to pay money to a person, whether natural or artificial, is within these prohibitions, unless funds are on hand or, at least, provided for the payment of such indebtedness out of the current revenues of the municipality." See also cases of *O'Bryan v. City of Owensboro*, 113 Ky. 680, and *Stanley v. Townsend*, 170 Ky. 833, and cases referred to therein. We deem it unnecessary to further refer to or quote from either opinions or text writers. When section 11, of the 1920 act provides that the state shall refund to the county the amount of money advanced by it when the "project," of which the road through the county is a part, is completed, evidenced by the certificate of the state highway commission, the certificate becomes an obligation of the state to the county and it can not be classified or defined in any other way than as evidencing an indebtedness of the state to the county to be paid when the "project" of which the road is a part is completed.

But it yet remains to be seen whether such a debt is forbidden by the sections of the Constitution, *supra*, for, as will be seen, from the *Stanley* case and others referred to therein, an obligation, although amounting to a technical debt, is not forbidden by those sections, if (a) provision is made in the act creating it for its payment, or (b) if funds are already in the treasury to meet it, or (c) if the uncollected revenue provided for the year in which it is created will be sufficient to meet it when collected. Those cases, as well as all of the other authorities hereinbefore referred to, hold, that although the payment of an obligation is deferred, if it is created under the circumstances of either (a), (b) or (c) above, it is not a debt within the meaning of the constitutional provisions limiting indebtedness and the state, through the legislature or otherwise, may lawfully create it. On the contrary, if no provision is made in the act creating or authorizing the creation of the indebtedness for its payment, or if there is no money available in the treasury to meet it, or if the revenues already provided and to be collected for the year in which it is created are, or will be, insufficient to meet it and all other outstanding ones against the particular fund so provided or to be collected when collected, the debt is unauthorized and is uncollectible.

Another instance in which the debt will not contravene the constitutional limitations, or be an obligation contrary to its provisions, is when it is payable out of a *special fund*, and it is upon this ground that counsel seriously rely to save the obligations which the state incurs under the provisions of section 11 of the act under consideration, from coming within the provisions of either sections 49 or 50 of the Constitution, since it is claimed that the state's obligations to the counties (created as provided in section 11 of the act) are to be paid out of the special road fund of the state. We have searched the act in vain to find where it is provided that the cost of constructing the state system of roads, therein provided for, is payable exclusively out of any special road fund; but if it should be assumed that such was the case it would not sustain counsel's contention, since the "special fund," out of which a debt shall be paid in order to relieve it from the operation of the limiting provisions of the Constitution, is a fund which does not belong to the state, county or other municipality contracting the debt, but which belonged to others and to which the holder of the debt must look for its payment. Illustrations of such *special payment* funds, effectual to relieve the indebtedness from the constitutional inhibitions, are charges and liens against abutting property for improvements constructed or contracted for by the municipality. Another illustration is to be found in the case of *Tartar v. Skaggs*, 184 Ky. 58. There the county of Edmonton contracted for the construction of roads, the total amount of which was more than the county could incur under constitutional provisions, but 75% of the cost of the construction was to be paid by the state under the state aid law, and the county in its agreement with the contractor did not obligate to pay that three-fourths, but only obligated itself to pay one-fourth (its part of the construction) and to collect from the state the other three-fourths and pay it to the contractor when collected. We held that the portion of the cost of the construction due from the state was a *special fund* and could not be taken into account in measuring the authority of the county under the Constitution to contract. The annotations, *supra*, to the cases referred to in the L. R. A. reports, cover the entire field touching the question under consideration and there is not found in any of them a single case where

the authority contracting the debt may specialize a fund out of which it may be paid at some time in the distant future when it becomes due, and thus validate the debt, although exceeding the constitutional limitations, upon the ground that it is payable out of a "special fund."

Under this contention the legislature, or the debt contracting authority, could divide the public revenue into numerous subdivisions calling one the "Road fund," another the "School fund," another the "Agricultural fund," another the "Public Health fund," and others almost without limit. Debts could then be contracted in unlimited amounts and payable in the far distant future, and still be immune from attack as violating constitutional provisions limiting indebtedness, provided each debt was made payable out of some one of the specially designated funds into which all of the revenue collected by taxation from the people had been divided. A mere statement of the proposition carries with it, it seems to us, its own refutation.

Were we to uphold this contention it would be equivalent to lending our support to the merest subterfuge practiced for the purpose of evading a most healthy and wholesome provision of the Constitution; for it must not be forgotten that the debt limit provisions of state constitutions were adopted and were designed to remedy a rapidly growing evil of extravagance on the part of the various states as well as of municipalities. There was a great haste to obtain and become possessed of advantages enjoyed by older and wealthier states, communities and municipalities and to gratify such desires contracts and projects were recklessly entered into under the name of public improvements and many communities and counties, as well as states, found themselves in almost a hopeless state of bankruptcy. Therefore, as said in 37 L. R. A. (N. S.) *supra*, 1061: "The courts have shown a disposition to uphold the debt limit provisions in the spirit in which they were enacted, although various schemes have been devised to evade them." And on page 1062 the annotator says: "The history of both states and municipalities since the adoption of the pay-as-you-go policy beyond a certain limit has been satisfactory, proving the wisdom of limiting public expenditure, and showing that there is no reason why these provisions should not be rigidly

enforced." As especially bearing upon the "special fund" payment feature of the question we refer to the *Ottomwa* case, *supra*, and to that of *State v. Candland*, 140 Amer. St. Rep. 834, 24 L. R. A. (N. S.) 1260, 36 Utah 406.

The inevitable conclusion from what has been said, therefore, is that when the state highway commission accepts an advancement of money from a county and issues its certificates therefor to be paid by the state when the project is completed, whether out of the special road fund or not, the debt of the state thereby created is valid, if at the time there is a sufficient fund in the state treasury not otherwise appropriated, anticipated or contracted against, out of which the certificate may be paid, or if there will be available in the treasury at any time during the year in which the contract is made, from sources already provided for, funds sufficient to meet not only that debt but the aggregate amount of all others outstanding and similarly or otherwise created; but when the aggregate indebtedness, thus or otherwise created, equals the funds in the treasury available for their discharge, or equals the amount of revenue for the purpose provided for the year, although not collected, after deducting a reasonable sum for deficits or losses in failing to collect, debts thereafter created in anticipation of, or to be paid with revenues to be collected or provided for future years, are prohibited by the sections of the Constitution, *supra*, and are therefore void.

It is insisted, however, that section 157a of the Constitution, adopted in 1909, repealed by implication sections 49 and 50 of that instrument in so far as to remove all limit upon the indebtedness which the state might incur to the counties for the construction of roads. We can not agree with this contention. The transaction here involved is not a pledging of the state's credit, or a lending of the state's credit to the counties as contemplated by the section of the Constitution referred to. But, if it were otherwise, the contention of counsel would not necessarily follow. The main, if not the only, reason, as we have seen, for providing for debt limitations was to curb the extravagant spirit of the people, which had been chiefly manifested in the construction of improvements such as roads; and if the contention of counsel should be upheld the effect would be to prac-

tically repeal altogether sections 49 and 50 of the Constitution, a result which we are confident was never intended or contemplated by the legislature in submitting the amendment, nor by the people in voting for and adopting it. Constitutions like statutes are to be construed so that all parts of them may stand together, and if section 157a was even susceptible of the interpretation insisted on by counsel, it would be our duty to reconcile it with the other two sections referred to, and to hold that the *credit* of the state, mentioned in section 157a, which it might pledge or loan to the county, was only such credit as is contemplated in, or as is measured by, sections 49 and 50 of the Constitution, and that which it may have provided itself with, according to the provisions of those sections, as interpreted by this court, and in view of other revenue sections. Prior to the adoption of section 157a the state could not loan its credit to the counties for the construction of roads. (Section 177 Constitution.) It is clear to our minds that it was not intended by the adoption of that section to increase the credit of the state for any purpose beyond that provided by existing sections, but on the contrary, it was intended to allow the state to use its credit, as theretofore fixed and prescribed, for a purpose which it could not do before the adoption of section 157a.

The stipulation of the parties shows that at the time of the proposed advancement to the state of Hopkins county of the \$150,000.00 in question, there was a total revenue, constitutionally available to the state highway commission, of \$4,400,000.00; \$2,500,000.00 of which was received or due to be collected from state sources, and \$1,900,000.00 of which represented the sum receivable from the federal government. It is further stipulated that the total aggregate amount of applications by counties under the 1920 act at the time of the one here under consideration did not exceed \$1,037,000.00 as the sum proposed to be advanced by all the applying counties to the state. But it is further stipulated that a number of other counties are contemplating making applications to advance money to the state for the construction of roads "which additional applications will exceed \$2,000,000.00." Such applications, if made by the counties, with those already made will amount to a total sum of \$3,037,000.00, leaving only \$1,363,000.00 (without making deductions for

losses) which the state might expend on its system of roads above what it borrowed from the counties; for if it expends any money other than that advanced by the counties such expenditure must be charged against the "available funds" as above outlined. Since, therefore, the proposed debt of \$150,000.00 of the state to Hopkins county may be paid out of the revenue on hand, or out of that which is available for the fiscal year in which it is contracted under provisions of law existing at the time of the contract or advancement, the state may lawfully agree to refund it and the borrowing of that sum by the state is not the creation of a debt which is inhibited by the constitutional provisions.

There being then nothing to prevent the state from creating the debt, under the circumstances, the only remaining question is, may the county of Hopkins lend that sum to the state? The terms of the 1920 statute are broad enough to confer such authority upon the fiscal court of the county and we have been cited to no provision in the Constitution forbidding it. The money is advanced by the county in the interest of a public improvement within its borders and with the construction and maintenance of which it is relieved by the undertaking of the state. The purpose therefore of the expenditure of the money is a local governmental one and we know of no reason why the county, if it is competent for the state to borrow, might not make the loan for such a purpose.

We are perfectly cognizant of the quite prevalent feeling throughout the state for the improvement of roads, in which feeling we most heartily share, but in order to gratify it we dare not cut ourselves loose from the moorings of the Constitution; nor should the possibility that this opinion might result in impairing some existing obligations in a manner which it is not necessary here to mention, influence our opinion. The effect of which would be to say that one violation of the Constitution authorizes both the legislature and the courts to tolerate another, which is clearly untenable. Furthermore, we are not justified in violating the obligations of our oaths of office either to meet a public demand or to render harmless the consequences resulting from an unconstitutional statute.

If the people of the state desire to spend money for public improvements or other purposes, in a sum beyond

the available revenue of the state and contrary to the limitations imposed by sections 49 and 50 of the Constitution, the legislature has the authority to provide means whereby it may be done. Section 171 of that instrument places no limit on the rate of taxation which the legislature may impose for state purposes, and money collected from that source and perhaps others, such as sharing in fines for misdemeanors, are the only sources from which revenues for the state are derived; and if a greater sum of money than is thereby collected is desired to be spent the only way to obtain it is, not by borrowing it, but by raising the rate of taxation, or bonding the state by a vote of the people, as provided in section 50 of the Constitution. In this manner all desired improvements may be obtained and either paid for at the time or in the future with proceeds of loans which the people endorsed.

Summing up the whole matter, our conclusion is that the bond issue involved was legally voted; that the proposed loan or advancement by Hopkins county to the state is, because of facts hereinbefore discussed, likewise valid, but the contract which the fiscal court of the county entered into with Caldwell & Company is invalid. The injunction should therefore be modified so as to permit the fiscal court to issue the bonds and to advance to the state for the purpose and in the manner indicated by section 11 of the statute, the sum of \$150,000.00, and the judgment is reversed with directions to make the modifications indicated, but it is affirmed as to the Caldwell & Company contract. The whole court (except Judge Clarke, who was absent) considered the case and all members concur.

Sheeran, et al. v. Jarboe. et al.

(Decided March 15, 1921.)

Appeal from Breckinridge Circuit Court.

1. **Wills—Undue Influence.**—On the issue of undue influence in a will contest, it is often necessary, in weighing evidence, to group together and draw conclusions from a multitude of apparently insignificant things, but which when all considered together tend to show such influence.

2. **Wills—Undue Influence.**—Evidence examined in a will contest and held to have been sufficient to submit to the jury the issue of undue influence.

W. S. BALL and JOHN P. HASWELL, JR., for appellants.

CLAUDE MERCER and ERNEST WOODWARD for appellees.

OPINION OF THE COURT BY TURNER, COMMISSIONER—Affirming.

In March, 1908, Dennis Sheeran died intestate, a resident of Breckinridge county, leaving a widow, Annorah, four sons, Peter, Dennis, Nicholas and Pat, and two daughters, Mrs. Jarboe and Mrs. Mattingly.

There was no administration upon his estate, which amounted to about \$12,000, but by agreement or acquiescence his son Pat took charge of his assets, all of which were personal property except a small home in Hardinsburg valued at about \$1,200 or \$1,300; and he thereafter paid to each of the children about one thousand dollars, and to the widow between five and six thousand dollars.

A short time after the death of Dennis Sheeran his son Nicholas died and left as his only heir at law an infant son, Daniel.

Some years later there was apparently some dissatisfaction upon the part of the two sisters with the settlement that had been made by Pat, and early in 1915 Mrs. Mattingly requested the county judge to appoint an administrator of her father's estate, and accordingly such an administrator was appointed on the 29th day of March, 1915, and two days thereafter, on the 31st day of March, Mrs. Annorah Sheeran executed her will, by the terms of which she gave all of her property, except a small devise to her church, to her three sons, Peter, Dennis and Pat, but made no provision for either of her two daughters or for the infant son of Nicholas.

Mrs. Sheeran died in the fall of 1917, and thereafter the paper was probated in the county court as her will, and from that order of probate Mrs. Jarboe, Mrs. Mattingly and the guardian of the infant appealed to the circuit court, seeking to have the paper probated as the will of Annorah Sheeran declared not to be her will because, as alleged, she was incompetent at the time the same was executed, and because her sons, the devisees therein, had procured her by undue and improper influence to execute the same.

Upon a trial in the circuit court a jury found against the will upon the ground of undue influence, the court having refused to submit the question of testamentary capacity because of the insufficiency of the evidence on that issue; and this is an appeal by the executor and devisees from a judgment entered on that verdict.

The only ground relied on for a reversal is that the verdict was contrary to the evidence and not sustained by it.

The plaintiffs' evidence is that from the year 1911 until Mrs. Sheeran's death her son Pat lived with her at her home; that he had absolute control of her business affairs and attended to everything for her; that she was a very domestic woman and took no interest in the management of her business; that she was easily influenced, and that her sons, especially Pat, had great influence with her and, as testified to by one of the daughters, could get her to do anything; that she had never had any serious differences with any of her children and appeared to love them all the same; that her two daughters, who lived a few miles away, came to see her as often as they could considering their family duties; that neither of her daughters knew until after her death that she had made a will, when for the first time they were so informed by their brothers at a family conference; that at the time of the execution of the will her age was between 70 and 75; that she and her husband had both been born in Ireland and married when young and had afterwards come to this country and consequently her exact age was not known.

The two daughters testified that at the family conference a few days after the death of their mother their three surviving brothers were all present and informed them that their mother had made a will, and said: "We had this will made in order to cut Daniel (the infant grandson) out, but with the understanding that you two sisters would share equally with us;" that they said it would look strange to have left Daniel out alone and so they also left the two daughters out so that it would not look so bad, but that it was understood that the daughters would get their share; and that Daniel, the grandson, was left out, the brothers claimed, because he already had plenty and had gotten through his father, Nicholas, more of Dennis Sheeran Senior's estate than any of the others.

This is the positive testimony of both of the sisters, although it is only fair to say that the three brothers deny

this, but at least one of them admits that they did say to the two sisters on the occasion mentioned that if they would institute no contest or legal proceeding they would see they got their proper share of their mother's estate.

In addition to all these circumstances it is in evidence that a lawyer wrote the will of Mrs. Sheeran without ever having talked to her and from a written, signed memorandum brought to him by Pat Sheeran, and that after the will was executed it was brought back to him by Pat Sheeran for safekeeping, and that he prepared the will in accordance with that memorandum which Pat brought him.

It further appears that Pat was present when the will was executed and procured both of the attesting witnesses to come to the home and attest it. It furthermore appears that in some way the old lady had become convinced that she had already provided for her daughters and so told each of the attesting witnesses, when, as a matter of fact, there is no contention here that either she or her husband had ever provided for either of the daughters to any greater extent than they had for their sons.

Evidence of undue influence like evidence of fraud is difficult sometimes to produce. Persons designedly going about the perpetration of a fraud or the exercising of unfair influences upon others with a view of controlling the disposition of their property, do not work openly, and for that reason it is necessary in weighing evidence in such matters to group together and draw conclusions from a multitude of apparently insignificant things, but which, when all are considered together, tend to show the iniquitous purpose and its accomplishment. *Rhea v. Madison*, 151 Ky. 262; *Sisby v. Shrader*, 104 Ky. 15; *Fry v. Jones*, 95 Ky. 149.

In this case we have, in addition to certain circumstances and conditions surrounding the parties, which are of themselves, to say the least, suspicious, the direct, positive statement of two witnesses that their brothers, the beneficiaries under their mother's will, not only admitted but voluntarily stated to them that they had caused their mother to execute this will for the purpose of disinheriting the infant son of their deceased brother, and with the distinct understanding that the two sisters should be given by their brothers their shares in the estate. In other words, it was a conspiracy to deprive the infant of his share in his grandmother's estate upon the pretext that

they would do justice to their sisters, and after this was apparently accomplished, they refused to do for their sisters what they had agreed to do.

Another most enlightening circumstance in the record is that the old mother never thought it was necessary to make a will disinheriting her two daughters and her grandson until two days after one of the daughters had caused an administrator of her deceased husband's estate to be appointed so that her son Pat, with whom she lived, might be required to account for all of his father's property which had passed through his hands.

With the positive evidence of the two women that the beneficiaries made the statement referred to three or four days after their mother's death, and the other circumstances pointing to the exercise of unfair influence, the court properly submitted that issue to the jury.

The judgment is affirmed.

Lindenberger v. Cornell, et al.

(Decided March 15, 1921.)

Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. Life Estates—Liens.—A life tenant, who is required to remove an encumbrance secured by a lien from the estate to prevent its sale, has a lien upon the entire property for recoupment.
2. Life Estates—Repairs and Improvements.—It is the duty of the life tenant to make all ordinary, reasonable and necessary repairs upon the property of the estate, and can not charge the remaindermen, personally, nor their interests in the property, with any part of the cost.
3. Remainders—Sale of Interest.—A vested remainderman may sell his interest in the property, and pass a good title to the purchaser.
4. Remainders—Sale of Interest.—A vested remainder, which is subject to a defeasance may be sold and a good title conveyed by deed to a purchaser, but, it will be subject to be defeated, if the event which creates the defeasance occurs.
5. Remainders—Contingent Remainder—Sale of.—Any contingent remainder in real estate may be sold and conveyed, but, unless the dubious and uncertain event, upon which the vesting of the estate depends, occurs at the time, when according to the instrument creating the estate, it must occur, to cause the estate to vest, the purchaser will acquire nothing by his purchase.

BURNETT, BATSON & CARY for appellant.

NICHOLAS T. WHITE for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HURT—
Reversing.

The appellant was the widow of one James Y. Currey, who died on the 4th day of December, 1916, but since has married the appellee, Harry B. Lindenberger. Her former husband, James Y. Currey, died testate, leaving a last will and testament which provided as follows:

“Article First. I direct the payment of all my just debts and funeral expenses as soon after my death as may be practicable.

“Article Second. I hereby give, devise and bequeath all the rest residue and remainder of my estate, both real and personal, wheresoever situated, whereof I am seized or possessed or to which I may be in any manner entitled or in which I may be interested at the time of my death, unto my beloved wife, Annie Cornell Currey, during her life, this provision being made for the benefit and in the interest of any child or children who may hereafter be born, believing it to be in their best interests for me thus to trust and to rely wholly upon my said wife to care for them and to provide properly for their support and maintenance.

“Article Third. I will and direct that so much of my residuary estate as shall remain upon the death of my said wife, Annie Cornell Currey, shall be divided into three equal parts; and, I hereby give, devise, and bequeath one of such parts to the heirs at law of my said wife, or to such person or persons as she may designate in case she elects to dispose of said one-third part by will; and I hereby give, devise and bequeath the remaining two of such equal parts unto my mother, Arthusa Ruth Currey, absolutely forever. But, if my said mother shall have died before the death of my said wife, then and in that event I give, devise and bequeath the said two equal parts unto my brothers and sisters then living, share and share alike.”

The testator left surviving him his mother, Arthusa Ruth Currey, and the following brothers and sisters, viz.: Maggie Currey Robinson, Sallie Currey Hemphill, wife of J. C. Hemphill, Mamie C. Gaines, wife of Fisher Gaines, Carrie C. Anderson, wife of John L. Anderson, Theodore Currey, whose wife is Harriet F. Currey, and William Y. Currey, whose wife is Ella Moore Currey.

At the time of the death of James Y. Currey, the appellant, his widow, had the following relatives: Evaline D. Cornell, her mother, and James H. Cornell and Theodore P. Cornell, brothers, and Lizzie C. Fleming, a sister. The testator's only estate consists of a house and lot in the city of Louisville which he purchased several years previous to his death, at a cost of \$4,350.00.

The testator, at the time of his death, was indebted to various persons in sums which aggregated \$1,200.00, and these debts his widow discharged with her own money. The dwelling house which testator owned at his death, being in need of repairs, the widow expended \$600.00 of her own money in making such repairs upon it as she deemed necessary. The testator's mother and his brothers and sisters, who were alive at the time of his death, joined in a deed of conveyance and attempted to convey to the widow in fee the two-thirds interest in the house and lot which under the will, subject to the life estate of the widow, was devised to the mother of testator, absolutely, if she should be living at the death of the widow, and if the mother was not then living to the brothers and sisters of testator who were then living.

The appellant, who was the widow, brought this action against the appellees, who are her mother, brothers and sisters, and who would be her heirs, if she should die at this time, claiming that she took an estate in the house and lot which was greater than a life estate, in other words she had a life estate with a power of disposition and had the power to sell and convey same, and that she was in need of the proceeds of the sale of same for her maintenance, and had been offered a fair price for it which she accepted, but the purchaser refused to accept a conveyance from her, or to consummate the contract, claiming that she could not convey a good title. She prayed for a construction of the will and a determination as to what estate she had in the property, as well as the other persons had, who are named in the will, and in the event it should not be decided that she had an estate coupled with the power which authorized her to sell and convey it, that she be adjudged a lien upon the property for the \$1,200.00 she had paid in discharge of the testator's debts, and the \$600.00 which she had expended in repairs upon the property, and that these liens be enforced and the property sold and any interest which she had therein be set apart to her.

The court adjudged, as follows:

1. The testator owned no property other than the house and lot at his death, and that it was indivisible.

2. The appellant was entitled to recover the sum of \$1,200.00 against the estate of the testator, with interest since February 3, 1917, and, also, the \$600.00 against the house and lot, both the life estate and the remainder interest.

3. By reason of the deed executed to appellant by the mother, brothers and sisters of testator, she became the owner of two-thirds of the property in fee, with power to sell and dispose of it upon such terms as she might choose, and appropriate the proceeds.

4. Under the will, appellant was the owner of a life estate in the other one-third of the property, with a power to dispose of it absolutely by will, and the appellees—her mother, brothers and sisters—were the owners of a vested remainder in it, and that they, as such vested remaindermen, had full power and right to convey the remainder and vest the purchaser with an absolute title thereto, subject to the life estate of the appellant and her power to dispose of it by will.

5. The appellant can not convey a title in fee simple to the one-third interest last mentioned, and that such title can only be conveyed by a joint conveyance of herself and appellees.

6. The appellant has a lien upon the said one-third part, devised to her for life, to secure the payment of one-third of the \$1,200.00 and \$600.00 above mentioned, and that such one-third interest be sold in satisfaction of same, and appellant was authorized to become a bidder at the sale.

7. If the undivided one-third interest should sell for a sum in excess of \$600.00, the appellant has only a life estate in the excess, and a right to the income from it, but no right to encroach upon the principal of it which should be put in the hands of a trustee, and invested as other trust funds, and held subject to the conditions of the will as to such one-third part.

From the judgment the widow has appealed.

(a) Considering the first, second and sixth findings of the court, the testator having left no other property than the dwelling house and lot, his indebtedness was a lien upon it, and the appellant having a life estate in the property and discharging the encumbrances with her own money to prevent its sale, is entitled to be substi-

tuted to the lien which the creditors had upon the entire property, and the right to an enforcement of her lien, and a sale of a sufficiency of the property to satisfy the debt with its interest. *Todd's Exor. v. First National Bank*, 173 Ky. 60; *Daviess v. Meyers*, 13 B. M. 51. The lien is not upon the third part of the property only, but upon the whole of it, and for reasons hereinafter shown, the judgment should have been for the entire amount of the indebtedness and for a sale of the entire property in satisfaction of it, instead of for a third part of the indebtedness and for a sale of only a third part of the property. Being a dwelling house and a small lot upon which it stands, it was not divisible, and for that reason a judgment could not be rendered to sell a sufficiency of it to pay the debt, but the widow was properly authorized to become a bidder at the sale. The parties in interest under the will would have the same interest in the excess of the proceeds of the sale as they would have in the property if it had not been sold.

(b) The defendants in the action made no objection to the assertion of the claim of \$600.00 expended upon the property for repairs nor to its assertion as a lien thereon, but in as much as the parties who under the will may eventually be the devisees of the remainder interests and entitled to the property, were not parties to the action and may not now be in existence, the court was not authorized to adjudge a claim to be a lien upon the property and a sale of it in part satisfaction of such a claim, when it could not, in any event, be a debt against the remaindermen, nor a lien upon their interest in the property. The record does not indicate the nature of the repairs, but it does show that at the death of the testator and when the life estate of the appellant came into existence, the testator and his family were then occupying the building, and that for such reason it was not untenable, although it might be in need of ordinary repairs, and that the repairs made by appellant at the cost of \$600.00 put it in good repair, and that it was now of the value of \$3,200.00. There is no principle better settled in this jurisdiction than that it is the duty of a life tenant to maintain the property in repair so as to preserve it from destruction, and that it may be preserved for the remaindermen in substantially the condition in which it was received by the life tenant, and to that end it is the duty of the life tenant to make all the ordinary, reasonable and necessary repairs to

preserve the property, and neither for the cost of such repairs nor for improvements made upon the property by the life tenant can he charge the remaindermen personally nor can they be made a charge against the interest of the remaindermen in the property. *Todd's Exor. v. First National Bank*, *supra*; *Lorman v. Lorman*, 173 Ky. 477; *Graves v. McDonnell*, 144 Ky. 607; *Frederick v. Frederick*, 31 K. L. R. 583; *Henry v. Brown*, 99 Ky. 13; *Wilson v. Hamilton*, 140 Ky. 327; *Mayes v. Payne*, 22 K. L. R. 1465; *Hackworth v. Louisville Artificial Stone Company*, 106 Ky. 235; *Delker v. Owensboro*, 30 K. L. R. 440; *Creutz v. Heil*, 89 Ky. 432; *Brodie v. Parsons*, 23 K. L. R. 831; *Prescott v. Grimes*, 143 Ky. 191; *Stovall v. Mayhew*, 173 Ky. 212; *Presbyterian Church v. Fithian*, 29 S. W. 143; *Neel v. Noland*, 166 Ky. 469; *Caldwell v. Jacob*, 16 K. L. R. 21; *Wilson v. Hamilton*, 140 Ky. 329; *Holmes v. Lane*, 136 Ky. 21; *Nall v. Miller*, 95 Ky. 448; *Gaulbaugh v. Rouse*, 31 K. L. R. 583; *Culton v. Kenney*, 18 K. L. R. 1065; *Sparks v. Ball*, 91 Ky. 502; *Johnson v. Stewart*, 8 K. L. R. 857; *Scott v. Scott*, 183 Ky. 604. It may be insisted that the facts of the instant case differentiate it from those supporting the general rule, in that the property was in need of the repairs at the time the life estate was created and began, but the difference does not require a different conclusion from the general rule, when it is remembered that all of the precedents in this jurisdiction are to the effect, that although a life tenant may construct a new building of a permanent character and thus add materially to the value of the remainder, it will be presumed to have been done by the life tenant for his comfort and pleasure, and with the knowledge of his estate, and he can not apportion any part of the cost to the remaindermen or their interest in the property. In *Clemence v. Steere*, 53 Am. Dec. 621, it was said: "If the life tenant receives a house in such a state as not to be reparable, or so dilapidated that the expense of repairing would be beyond the value of the house, he is not bound to repair, and may leave it to its natural destruction, but if the house is such that repairs would make it tenantable, he is bound to make them." Without adhering to the soundness of the above rule in its entirety, but applying our own rule to such a state of facts, it would seem that a life tenant receiving a house which was in need of only ordinary repairs, it would be his duty to put it in repair, and, at the least, having done so, it would be pre-

sumed to have been done for his own comfort and convenience, and could not be made a charge upon the remaindermen personally, nor against their interest in the property, and hence the court was not authorized in adjudging that the \$600.00 claim for repairs or any part of it was a lien upon any part of the property as between the life tenant and the remaindermen.

(c) The court by its seventh finding held that appellant received under the will a simple life estate only, and was therefore entitled only to the use of the property, if preserved in kind, or if converted into money, the income therefrom during life, and this holding is challenged by the life tenant, the appellant. There is no contention and no ground for contending that the appellant takes as much as a fee simple estate under the will, but it is contended that she takes a life estate coupled with an unrestricted power of disposition. That, if she has a power of disposition at all, it is clear that it is not unrestricted, since, if testator did not expect that some portion of the devised property would remain unconsumed or undisposed of at the death of his wife, it would have been needless to have made a limitation over of any part of it, in remainder, as he did. The will does not contain any express power of disposition, but we are of the opinion that a limited power must be implied from a consideration of the entire will. The property, however, consisting of real estate alone, and the life estate not coupled with an express power of disposition by the life tenant, in the light of the recent opinion in *Clore v. Clore*, 184 Ky. 83, and the extension of the opinion in the same volume, page 89, whether there is a power of disposition by the act of the life tenant, ceases to be of importance, as in such cases, where the corpus of the estate may be encroached upon to provide a comfortable maintenance for the life tenant, it is held that application must be made to the chancellor to authorize a sale of such real property, who may determine the necessity and the extent of it. We think the appellant, as a life tenant, takes more than a simple life estate, though less than a fee, and that she is entitled to the entire income from the property, and if necessary, to provide for her a comfortable maintenance in addition to the income, the corpus of the estate may be encroached upon to the extent that it is reasonably necessary for that purpose. The language in the third clause of the will preceding the provisions for the limita-

tions over, in remainder, after the life estate, is clearly indicative of the intention of the testator, when he says, "I will and direct that so much of my residuary estate as shall remain upon the death of my said wife, etc.," to limit over in remainder, such part of the estate only as may not be consumed or disposed of at that time, by the life tenant, and it further conclusively indicates that the testator expected that a portion of it at the least, might be disposed of or consumed at that time, though probably all of it would not be so consumed. It will be observed that the above quoted language follows immediately the clause by which the entire estate is given to the widow during her life, which with the accompanying language manifestly shows the intention of the testator to provide the wife with the means of a reasonably comfortable maintenance during life. There being no two wills alike, it is difficult to find any precedent to guide in the construction of any will, but general principles have to be relied upon and the constructions heretofore placed by the courts upon wills having similar language or similar import. Wills having similar language to the instant one have often been held to give to the life tenant, by implication, the power to dispose of the property, and to use more than the income for a necessary maintenance and support, especially where such intention on the part of the testator can be deduced from a consideration of the entire will. The following cases, though not sufficiently alike in language to the instant one, to constitute a precedent are illustrative of the principle invoked: *McClelland v. McClelland*, 132 Ky. 284; *Anderson v. Hall*, 80 Ky. 91; *Angel v. Wood*, 153 Ky. 201; *Becker v. Roth*, 132 Ky. 429; *Hickman v. Moore*, 160 Ky. 475; *Clore v. Clore*, 184 Ky. 83; *Presbyterian Church v. Mize*, 181 Ky. 567. Hence, when a sale of the property in the instant case is directed, the excess of the proceeds, after the satisfaction of the appellant's debt against it, should be put in the hands of a trustee, with directions to pay the entire income, less cost of trust, to the life tenant, and such further sum as may be reasonably necessary from time to time to provide for her a comfortable maintenance and to hold the residue of the fund subject to conditions provided in the third clause of the will, or else secure the interests of the remaindermen, by requiring the execution of bonds for that purpose by the life tenant, as may be done by courts of equity.

(d) The limitation over after the life estate of appellant of two-thirds of the property to the mother, brothers and sisters of the testator, is expressed in the following language: "And I hereby give, devise and bequeath the remaining two of such equal parts unto my mother, Arthusa Ruth Currey, absolutely, forever. But, if my said mother shall have died before the death of my said wife, then and in that event, I give, devise and bequeath the said two equal parts unto my brothers and sisters then living, share and share alike." The estate devised to the mother of testator was a vested remainder, as she was capacitated to enter into the possession of the property, in enjoyment, upon the happening of the event, upon which her estate depended which was the death of the life tenant, and which was an event certain to occur, but, her interest was subject to be defeated by her own death, before the termination of the life estate of the appellant, and in other words, she was vested with a defeasible fee, in remainder. The interests devised to the brothers and sisters of the testator were not vested remainders, but, executory devises, with all the essentials of contingent remainders. Their interests would never attach nor vest, in enjoyment, except certain events should occur, which were uncertain and would probably never occur, one of which was that the mother of testator should die before the termination of the life estate, and another was, that if the mother should die before the termination of the life estate, that they would be then alive. A vested remainder is a fixed interest to take effect in enjoyment after a particular estate is spent, and is an actual estate, which may be sold and the title passed to the purchaser, but, a contingent remainder is one limited so as to depend on some event or condition, which is uncertain and may never happen or be performed. *Johnson v. Jacob*, 11 Bush, 656; *Bowling v. Dobyns*, 5 Dana 441; *Jackson v. Sublette*, 10 B. M. 472; *Williamson v. Maynard*, 162 Ky. 726; *Turner v. Johnson* 160 Ky. 169; *Leppes v. Lee*, 92 Ky. 16; *Walter v. Crutcher*, 15 B. M. 10; *Slote v. Reiss*, 153 Ky. 30; *Fulton v. Teager*, 183 Ky. 381; *Williamson v. Williamson*, 18 B. M. 368; *Moore's Admr. v. Sleet*, 113 Ky. 600; *Neil v. King*, 104 S. W. 380. Under section 2341 Kentucky Statutes, a contingent remainder of any kind is the subject of a sale and conveyance, but, the purchaser will receive nothing, unless the contingent remainderman survives, until the event occurs upon which

his estate vests, or at the least, unless in certain instances where the designation of a remainderman is fixed and certain, and the only contingency is the happening of the event upon which his estate depends and such event occurs. *Bank of Taylorsville v. Vandyke*, 159 Ky. 201; *Fulton v. Teager*, 183 Ky. 381. Hence, if the mother of testator should outlive the appellant, the title to the remainder in the two-thirds of the property, which she conveyed to appellant by her deed would pass a good title, but, if the mother of testator should die before the termination of the life estate, the title made by her would fail. The deed executed to appellant by the brothers and sisters of testator, does not convey her any title, unless one or more of them should be living, at the termination of the life estate of appellant, and the mother of testator had died theretofore, or in other words, at the happening of the events, upon which their interests would vest, in enjoyment. If mother, brothers and sisters of the testator, should not be living at the death of appellant, the two-thirds interest in the property would pass to whoever, the heirs of testator might then be, as undeviseed estate. A conveyance of their contingent interests in the one-third of the property, which was devised to the heirs of appellant, by her mother, brothers and sisters, does not convey any title to her, unless the mother, brothers and sisters, or one or more of them should be the only heirs of appellant at her death. The third clause of the will was made by testator, evidently, in contemplation, that, he would die childless, and the heirs of appellant to whom the devise was there made, could not be construed to be her children, and a living person can not have heirs. When property is devised to one for life with remainder to the heirs of the life tenant the heirs take a contingent remainder, *Jones v. Thomasson*, 159 Ky. 196; *Williamson v. Maynard*, 162 Ky. 726; *Williamson v. Williamson*, 18 B. M. 329. The persons who would be the heirs of appellant, if she should now die, will in all reasonable probability not be her heirs, when she does die and will have no interest in the property, because the event has never occurred, which would cause their contingent remainders to vest. Hence, the court was in error, in adjudging that the conveyance by the mother, brothers and sisters of testator vested a fee simple title in appellant to the two parts of the property, attempted to be conveyed by them, and that a conveyance by the mother, brothers and

sisters of appellant to her of the other part of the property would convey her a good title.

The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

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- lookout duty is required, and the physical conditions are such that a lookout by the engineer alone is not effective, then it is the duty of the fireman to keep a lookout unless engaged in the performance of a duty no less urgent and necessary for the protection of human life, and the putting in of coal is not such a duty. *Id.* 125
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2. Employment and Authority—Commissions.—Where property is placed in the hands of a broker with authority to seek a purchaser upon stated terms, and he finds such purchaser who is ready, willing and able to comply with the terms, he has earned his commission; but there being no definite contract for the amount of his compensation, the law will imply a contract to pay him the value of his services. *Id.*..... 511
 3. Actions for Compensation—Quantum Meruit.—In an action on a quantum meruit for services rendered it is not necessary to allege a promise to pay but only to set up the facts from which the law will imply the promise. *Id.*..... 511
 4. Employment and Authority.—The owner of property who has placed same in the hands of a broker but not by a contract of exclusive agency, retains the right to sell the same himself at any time before receiving notice that such agent has found a purchaser ready, willing and able to buy upon the terms named; but the sale contemplated in this rule is either the execution and delivery of a conveyance or the entering into of a binding, written contract which may be enforced. *Id.*..... 511
 5. Compensation—Sale by Owner.—A sale by the owner which will deprive the broker of compensation, must be a completed, valid sale, or an enforceable written contract, consummated before having notice that the broker has a purchaser, and the owner can not so deprive him by merely entering into an oral or other unenforceable agreement to sell the property. *Id.*..... 511
 6. Compensation.—If the owner receives notice that the broker has found a purchaser after he has verbally agreed with another purchaser to sell and convey him the property, but before he has executed and delivered such conveyance or entered into any binding, written contract, the broker is entitled to compensation. *Id.*..... 511

BURDEN OF PROOF—See Deeds; Wills.

BURGLARY—See Robbery.

BYSTANDERS—See Exceptions, Bill of.

CANCELLATION—See Contracts; Deeds; Mines and Minerals.

CARNAL KNOWLEDGE—See Rape.

CARROLL, JUDGE JOHN D.—See Prefatory Matter, pages (a) to (d.)

CARRIERS—See New Trial—**Page**

Action By Passenger for Injury—Instructions.—In a suit to recover damages by a passenger against a carrier for an injury inflicted by a jerk, the plaintiff must both allege and prove, not only that the jerk of the train or car was sudden, unusual and unnecessary, but in addition thereto that it was of such violence as to indicate negligence on the part of the carrier, and an instruction which does not embody all these elements is improper. *L. & I. R. R. Co. v. Roberts. Same v. Same* 744

CHARACTER—See Assault and Battery.

CHILDREN—See Appeal and Error; Wills,

CITIES—See Municipal Corporations; Schools and School Districts.

CLAIMS—See Executors and Administrators.

COLLATERAL AGREEMENT—See Deeds; Judgment.

COLLATERAL ATTACK—See Judgment.

COMMISSIONS—See Counties; Principal and Agent.

COMPENSATION—See Brokers.

CONDEMNATION—See Eminent Domain.

CONDITIONAL SALES—See Sales.

CONFESSION—See Criminal Law.

CONFIDENTIAL RELATIONS.

CONSIDERATION—See Contracts; Fraud.

CONSTITUTIONAL LAW—See Mandamus; Schools and School Districts; States; Statutes—

Application of Statute—Delegation of Authority.—When the legislature enacts a statute, which it to take effect upon the happening of an event, or the existence of certain facts, it may authorize a court to ascertain the event or the existence of the facts, upon the existence of which the statute has application, and it will not thereby delegate to the court a legislative function. *Boone County v. Town of Verona*..... 430

CONSTRUCTION—See Contracts; Deeds; Libel and Slander; Mines and Minerals; Municipal Corporations; Statutes; Wills.

CONSTRUCTIVE NOTICE—See Vendor and Purchaser.

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CONSTRUCTIVE TRUSTS—See Trusts.

CONTINGENT REMAINDERS—See Remainders.

CONTINUANCE—See Criminal Law.

CONTRACTS—See Gas; Frauds, Statute of; Mines and Minerals—

1. Construction.—The cardinal rule in the construction of contracts is to ascertain from all of its terms the intention of the parties and give it such construction as will carry out that intention; but the intention to be administered is the one expressed by the words employed in the contract and not a secret, unexpressed and only mentally entertained intention. *Siler v. White Star Coal Co.*..... 7
2. Alteration of Instruments.—A written contract may be altered, modified or even substituted by a subsequent oral one in all cases where the law does not require the contract to be in writing; but for the oral alteration or modification to be effective it must be supported by a legal consideration which need not be the payment of money or delivery of property, but it may be anything which is of benefit to the promisor or detriment to the promisee. And, "benefit" in this connection means that the promisor has in return for his promise acquired some legal right to which he would not otherwise have been entitled; while the word "detriment" as so used means that the promisee has in return for the promise forborne some legal right which he otherwise would have been entitled to exercise. *Wallace v. Cook* 262
3. Failure of Consideration.—In the absence of the payment of money or the delivery of property, or an agreement to do so, and in the absence of some such benefit or detriment as above defined there is a failure of consideration and no legal rights accrue to the parties. *Id.* 262
4. Construction—Intention of Parties.—In the interpretation of contracts courts are chiefly concerned as to the intention of the parties as expressed by the terms they employ, which is always to be administered if it can be ascertained from the entire contract. *Id.* 262
5. Intention of Parties.—In arriving at the intention of the parties words may be discarded as surplusage when necessary to effectuate the intention and if a contract is equally susceptible to two constructions, the one being equitable and just to the parties, while the other is oppressive and inequitable to one of them and places him at the mercy of the other, the more equitable interpretation will be adopted; likewise in such cases if necessary to reconcile the ambiguity and to administer the intention of the parties it will be construed

CONTRACTS—Continued—

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- more strictly against the one who prepared and printed it and who employed the words in which it is expressed. *Id.* 262
6. Construction.—In case of an irreconcilable conflict between written words and figures in a contract the figures will surrender to the written words and the latter will prevail. *Id.* 262
7. Construction.—Where a written contract with a real estate agent for the sale of land provided that he should have until "60 days" in which to sell it and then provided that the sale should be at auction and held not later than a stipulated day which was far short of the "60 days:" Held, that the term "60 days" should be discarded, since it was plainly the intention of the parties to provide for only one sale which was at "auction" and which was to occur on or before the day fixed in the contract for it. *Id.* 262
8. Consideration.—Where the purchaser of a tract of land promised to give a tenant in possession \$500.00 for the surrender of the possession on January 1st of the following year, the tenant's contract with his landlord to be cancelled when the possession was given, there was no failure of consideration because the lease was within the statute of frauds or the landlord did not consent in writing to the assignment thereof, since the \$500.00 was to be paid not for an assignment of the lease, nor for the purpose of acquiring any rights thereunder, but solely for the purpose of obtaining possession and putting an end to the tenant's rights under the lease. *Halcomb v. Taylor.* 413
9. Inconsistent Contracts—Instructions.—On a trial where the issue is whether one party had authority to bind another in the execution of a contract, and there were two contracts offered in evidence on the issue, and under the first he had the authority and under the second he had not, the court should have instructed the jury whether the latter contract terminated the former. *Townsend & Freeman Co. v. Tabor.* 521
10. Agency.—If one having large contracts for ties to fulfill, enters into a contract with another wherein he agrees to pay the latter stipulated prices for ties which he puts out in his territory, and the first party is to receive a commission on each tie so furnished and is to supply the second party with the money to carry on the business, the second party is not thereby created the agent of first party so as to bind him in the execution of a contract for the sawing and production of a large number of ties. *Id.* 521
11. Inconsistent Contracts—Termination.—When parties, sustaining at the time contractual relations with reference to a particular subject-matter, again enter into a new contract solely with reference to the same subject-matter, the terms of which are inconsistent with those of the original contract and the

CONTRACTS—Continued—

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- legal effect of which is essentially different, the first contract is terminated, although there be no express provision to that effect. *Id.* 521
12. Evidence.—The correspondence between the parties and their actions under the first contract which had been terminated are incompetent evidence upon the issue whether the party had authority under the second contract. *Id.* 521
13. Issues, Proof and Variance.—Under the common law practice it was a fatal variance when the proof showed a differently evidenced contract from the one declared on, as, for instance, proof of a written contract where the pleadings alleged an oral one, and vice versa, and this was true whether the variance was or not material; but this harsh rule has been modified by sections 129 and 130 of our Civil Code of Practice, which do not permit a litigant to be defeated because of a variance unless it is a material one, and it is not material unless it misleads the litigant to his prejudice, and the burden is on the one claiming to have been misled to show that fact to the satisfaction of the court. Under this modification of the common law rule a suit based on an alleged oral contract will not fail because of proof of a written contract conforming substantially in every particular to the alleged oral contract. *Rogers-Siler Grocery Co. v. Pickrell-Craig Co.* 545
14. Issues, Proof and Variance.—A variance, in law, means a difference between an allegation of a litigant's pleading and his proof sustaining it, and does not mean a difference between his allegation and his opponent's proof concerning it. *Id.* 545
15. Consisting of Separate Sheets of Paper—Alteration or Modification.—A written contract whether required to be in writing or not may consist of separate parts on separate sheets of paper, though each be executed and agreed to at different times, and a written contract may be altered or modified by another written stipulation, though the latter be contained in a letter addressed to the other party, and although there may be no change or alteration in the words of the originally drafted contract, and if such modification is made at the suggestion of the other party, the contract will be complete as soon as the letter containing it is mailed, provided it is written within a reasonable time after the request for the modification. *Id.* 545
16. Rescission.—Before a purchaser of personal property can have a rescission of a contract, he must put the seller in statu quo by returning the property purchased if it be of value, or offering to return it if it be refused. *Church v. Wright Machine Co.* 561
17. Rescission.—The purchaser of personal property can not have a rescission of the contract unless he return the property purchased to the seller at the place of delivery within the time

CONTRACTS—Continued—

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- specified in the contract, if such a time be fixed; and if no time be fixed by the contract then within a reasonable time, the facts and circumstances considered. *Id.*..... 561
18. Rescission—Damages for Breach.—If personal property when delivered is not in compliance with the terms of the contract of purchase, the purchaser may have relief in one of two ways: (1) return the property and have a rescission of the contract; (2) retain the property and sue for the damages suffered by reason of the breach of the contract. *Id.*..... 561
19. Cancellation.—The cancellation of an executed contract by a court of equity is the exercise of an extraordinary power and should not be resorted to except in a clear case. *Lacey v. Layne.* 667
20. Ambiguity.—In the interpretation of ambiguous and uncertain contracts, which have been executed or partially executed, the courts will generally adopt that construction which the parties themselves in operating under the contract have given to it. *Consolidation Coal Co. v. Gibbs.*..... 717
21. Agreement to Release—Consideration.—A release or rescission of a duly executed contract for the sale of land must be supported by a valid consideration in order for the court to enforce the unexecuted releasing or rescinding contract. And if the agreement to release or rescind does not relieve the vendor of any obligations he assumed in the contract of sale nor confer any benefit upon him, it is unilateral and so far as the vendor is concerned it is without consideration and not binding upon him. *Mathis v. Martin.*..... 723

CONTRIBUTORY NEGLIGENCE—See Master and Servant.

CONVEYANCES—See Deeds; Logs and Logging.

CONVICTS—See Statutes.

CORPORATIONS—

1. Sale of Property By.—A corporation has the same right to sell its property as does a natural person provided the sale is bona fide and for a valuable consideration paid to the selling corporation as such and with which it may discharge its debts, and when the sale is thus made the purchasing corporation will take the property free from any claims of the creditors of the selling corporation. *Moss Jellico Coal Co. v. Jones* 53
2. Absorption of Property By Another Corporation—Lien.—If, however, the transaction by which the property is transferred is not in reality a sale in the usual and ordinary way, but consists in an absorption by one corporation of all the property of another or a merger of one into the other, the

CORPORATIONS—Continued—

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- property being paid for with stock in the purchasing corporation delivered to the stockholders in the selling one or to the corporation for their use and benefit, the creditors of the merged or absorbed corporation will have a lien upon the property transferred and may subject it in the hands of the absorbing corporation, subject, however, to the rights of superior lien holders. *Id.* 53
3. Sale of Property—When Purchasing Corporation Not Liable for Debts of Selling Corporation.—A corporation like a natural person may sell its assets and property and when it receives therefor its fair value in money or property the purchasing corporation will not, in the absence of contract obligation, be liable for the debts of the selling corporation. *American Railway Express Co. v. Commonwealth* 636
4. Liability of Purchasing Corporation for Debts of Selling Corporation.—When a corporation sells its assets and property without consideration or to defraud its creditors or is merged into a new corporation or the new corporation is merely a reorganization of the old one under a new name or the selling corporation is only paid for what it transfers by stock in the new corporation, the new one will be liable for the debts of the old one. *Id.* 636
5. Liability of Purchasing Corporation for Debts of Selling Corporation.—When a corporation doing business in this state has in the state sufficient tangible property to pay its debts and it sells all its property to a new corporation and takes in payment therefor stock in the new one the latter will be liable for the debts or liabilities of the old whether in contract or tort or liquidated or unliquidated existing against the old corporation at the time of the sale although the old corporation may have in some other state property out of which its debts created in this state could be collected and retain its corporate existence, but merely for the purpose of winding up its affairs. *Id.* 636

CORROBORATION—See Criminal Law.

COSTS—See Executors and Administrators—

Question of Allowance Upon Appeal.—Questions of allowances of cost in equity cases are to be governed largely by the facts of each case and to be apportioned by the trial court in the exercise of a sound discretion, which will not be disturbed on appeal unless it has been abused. *Fischer, Admr. v. Lange*..... 699

COUNTIES—See States—

1. Fiscal Management, Debt and Taxation—Power to Issue Bonds.—The limit of a bond issue under Ky. Const., sec. 157a, is determinable by the amount that can be raised by a levy of

COUNTIES—Continued—

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- 20 cents on each \$100.00 of the assessed property valuation at the time of the issuance and sale of the bonds and not at the time a vote authorizing said issue is taken. *Young v. Fiscal Court Trimble County.* 604
2. **Fiscal Management, Debt and Taxation—Power to Issue Bonds.**—A vote in favor of a bond issue under Ky. Const., sec. 157a, does not of itself create an indebtedness as the debt is not incurred until the bonds are issued and sold, hence an election as to incurring indebtedness by the issue of bonds is not invalid merely because at the time of the election the debt limit has been exceeded where same is not exceeded at the time the bonds are actually issued and sold *Id.*..... 604
3. **Issue of Bonds for Road Purposes—Deferring Issuance.**—In an election held in May, 1916, the county was authorized to issue bonds to the amount of \$90,000.00 for road purposes under Ky. Const., sec. 157a, but it was deemed expedient and advisable by the county officials at the time to issue only one-half of the amount authorized. More than four years after the vote was taken the county decided to issue additional bonds for road and bridge purposes under the previous election: Held, that the circumstances presented by the record were such that the county officers were justified in deferring the issuance of additional bonds for period stated. *Id.* 604
4. **Indebtedness for Road and Bridge Purposes.**—While a tax for road purposes can not be levied under section 4307, Ky. Stats., until there is an indebtedness requiring the raising of revenue for such purposes, such indebtedness is incurred within the meaning of the statute when the fiscal court enters a proper order for the improvement or construction of public highways or bridges in the county. *Hughes v. Elson*..... 661
5. **Recovery of Sheriff of Money for Road Purposes.**—Taxpayers can not recover of the sheriff money paid in as tax for road purposes where there is a good faith purpose evidenced by proper orders of the fiscal court to undertake the improvement or construction of public highways. *Id.*..... 661
6. **Recovery of Money Paid as Tax for Road Purposes.**—That money raised by a tax levy for road purposes is not used on the roads in the year for which it was intended, does not entitle the taxpayers to recover the same. If the road improvement or construction is unreasonably delayed a court of equity will, upon proper application, afford relief. *Id.*..... 661
7. **Elections—Proceedings Preliminary to Issue of Bonds.**—In elections called and held under the provisions of section 157a of the Constitution, the election may be called at the first regular term of the court after the filing or lodging of the petition asking therefor with the county judge, and if filed on that day it is competent for the election to be called at that

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- term; nor is it necessary to the validity of the election that the proposition voted on should receive two-thirds of the votes cast in that election since a majority of the votes is sufficient to carry the proposition. Neither is it necessary for such an election to be held on the regularly provided election day for the election of officers, since it may be held on any day fixed in the order calling it if the requisite notice is given. *Crick, County Judge v. Rash*. 820
8. Proceedings Preliminary to Issue of Bonds.—Orders made by the fiscal court after such an election, looking to the preparing, executing and selling of the bonds and to the custody, handling of, and expending the proceeds, are legislative in their nature and may be rescinded or modified at a subsequent term of the court. *Id.*..... 820
9. Duty of Fiscal Court in Sale of Bonds.—Under section 4307 of the statute it is the duty of the fiscal court to sell the bonds voted at such an election for not less than par and accrued interest and all of the proceeds arising therefrom must be used for the purposes for which the bonds were voted. *Id.* 820
10. Fiscal Court—Powers of.—Fiscal courts possess only such power and authority as are expressly conferred upon them by law and such other powers by implication as are imperatively necessary in order to carry out their conferred express authority. *Id.* 820
11. Fiscal Courts—Sale of Bonds—Commissions.—Fiscal courts, therefore, by implication have the authority to employ brokers and pay them reasonable commission to effect a sale of road bonds voted by the electors of the county pursuant to the section of the Constitution referred to, after it has made unsuccessful bona fide efforts to, itself, make the sale; but even in that case the fiscal courts possess no authority to contract or agree for the payment of a commission greater than is ordinarily and usually charged for similar services in transactions between individuals; and where the contract agrees to pay a commission of 5 per cent. on the gross amount realized, when the customary charge for similar services between individuals is far less than the compensation agreed upon, the execution of the contract will be enjoined in a proper action filed for the purpose. *Id.*..... 820

COUNTY ROAD ENGINEER—See Officers.

COURTS—See Officers; Trial—

1. County Courts Without Jurisdiction in Felony Cases.—The county courts of the respective counties of the state, have no jurisdiction to try or convict any one of a felony or misdemeanor. *Lang, Judge v. Commonwealth* 29

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2. Minute Books.—Minute books are not intended as permanent court records but are solely for the purpose of keeping notes of the business that comes before the court or is transacted by it. Matters written therein are not entitled to the weight or verity of court orders duly signed. Equitable Trust Co. of Dover, Ky. v. Bays, Admr. 91
3. Speak Only By Orders—Signing By Judge.—Courts of record speak only by their orders duly entered and signed in a book provided for that purpose, and the records of the proceedings of the court do not become final or binding until they are signed by the judge. Id. 91
4. Appointment of Administrator.—An order appointing an administrator on the motion of a creditor entered on the order book through the mistake of the clerk is of no legal effect where this order not only was not signed, but the court refused to approve the bond and caused a notation to be made on the order book that same having been entered through a mistake it was stricken from the record, and in a subsequent order appointing another administrator and duly signed by the judge the facts are specifically set forth. Id. 91
5. Judicial Notice of Acts of Congress.—A court will take judicial notice of the acts of Congress and proclamation of the President of the United States. McFeena's Admr. v. Paris Home Tel. & Tel. Co. 299

CRIMINAL LAW—See Assault and Battery; Embezzlement; False Pretenses; Incest; Rape; Railroads, 2, 3; Receiving Stolen Goods; Robbery—

1. Inmates of House of Reform.—Section 254 of the Constitution does not apply to inmates of the house of reform, but to persons convicted of felonies under the regular administration of the criminal laws of the state, and sentenced to confinement at hard labor in the penitentiaries. Lang, Judge v Commonwealth. 29
2. Submission to Jury.—In a trial of one accused of a crime or misdemeanor, where there is any evidence of guilt, although circumstantial, it is the duty of the court to submit the issue to the jury. Utterback v. Commonwealth. 138
3. Setting Verdict Aside.—A verdict of a properly instructed jury in a criminal trial will not be set aside, upon the ground, that it is against the evidence, unless it is palpably against the weight of the evidence. Id. 138
4. Appeal—Instructions—Harmless Error.—On a trial of an agent of a piano company for embezzlement defendant was not prejudiced by the failure of the court to define the word, "fraudulently," as used in the instructions, where the facts constituting a fraudulent conversion were actually submitted.

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- to the determination of the jury, and the jury was told by another instruction to acquit the defendant if they believed from the evidence that he, in good faith, kept back or appropriated any of the money or property for his own use, believing that he had a lawful right to do so. *Sebree v. Commonwealth*. 164
5. **Accomplices.**—An accused can not be convicted of a crime on the testimony of an accomplice alone. In order to convict him there must be other evidence, in addition to that of the accomplice, of such character as will tend to show, not only that the crime was committed, but that it was committed by him, or that he participated in its commission. *Gordon v. Commonwealth*. 172
6. **Accomplices—Corroboration.**—On an appeal of the defendant in a criminal case, seeking the reversal of a judgment of conviction on the ground that it was illegally obtained upon the insufficiently corroborated testimony of an accomplice, the test applied by the appellate court of the sufficiency of the corroboration of the testimony of the accomplice, is to eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witnesses with a view to ascertain whether there be inculpatory evidence, i. e., evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated. *Id.* 172
7. **Accomplices—Corroboration.**—As the application of the test, *supra*, to the evidence furnished by the record on this appeal convincingly shows a sufficient corroboration of the testimony of the accomplice, and even without that of the latter, authorized the verdict of the jury finding the appellant guilty of the crime of knowingly receiving stolen property, charged in the indictment, the judgment of conviction entered thereon, is free of error. *Id.* 172
8. **Accomplices—Corroboration.**—The case was properly submitted to the jury as the evidence of the accomplice was sufficiently corroborated. *Shuttles v. Commonwealth*. 176
9. A party taken by surprise during the progress of a trial should ask for a continuance and postponement of the case; he can not go on with the trial and take his chance of a verdict and failing in that then seek a new trial. *Lewis v. Commonwealth*. 160
10. **New Trial.**—Claim of surprise first made on a motion for a new trial comes too late. *Id.* 160
11. **New Trial—Newly Discovered Evidence.**—The courts should grant a motion for a new trial on the ground of newly discovered evidence when, on account of its materiality and probable effect, a manifest injustice would result from a failure to allow its introduction. *Id.* 160

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12. **New Trial—Newly Discovered Evidence.**—Newly discovered evidence of an impeaching and cumulative nature and not of so controlling a character as is reasonably calculated to have a decisive influence on a retrial, is not ground for a new trial. *Id.* 160
13. **New Trial—Newly Discovered Evidence.**—To entitle a party to a new trial on the ground of newly discovered evidence, the new evidence must be important and have been discovered after the rendition of the verdict. *Id.*..... 160
14. **Misconduct of Jury—Discharge of Jury.**—On a motion to discharge the jury on the ground of misconduct of one of their number where evidence was heard on the motion and this evidence is not before us, the presumption prevails that the conclusion of the trial court in overruling the motion is correct. *Id.* 160
15. **Accomplices—Corroboration.**—In determining whether under the provisions of section 241 of the Criminal Code there has been sufficient corroboration of the testimony of an accomplice, the rule is that if when the evidence of the accomplice is eliminated there yet remains other evidence connecting the accused with the commission of the crime, it is sufficient. *Frazer v. Commonwealth.* 196
16. **Arraignment Upon Charge of Incest—New Indictment for Detention of Female Against Her Will.**—A person who is indicted for incest and who is prepared on the day of trial to defend that charge can not over his objection be forced into trial under an indictment returned on that day charging him with the offense of detaining a woman against her will. A statement in the second indictment that it was in lieu of and a continuation of the charges in the former indictment will not avail the prosecution. *Breeding v. Commonwealth*..... 207
17. **Failure of Defendant to Testify in His Own Behalf—Instructions.**—An instruction telling the jury that the failure of the defendant in a criminal prosecution to testify in his own behalf should not be commented on, or considered by them as creating any presumption of his guilt of the crime charged, should not in every case necessarily be held to constitute reversible error. Whether it should be so regarded, would have to be determined by the facts of the particular case; but where, as in this case, the evidence so unerringly establishes the defendant's guilt as to convince the appellate court that the verdict of guilty returned by the jury, would have resulted, had the instruction in question not been given, the giving thereof by the trial court will not be held reversible error. *Armstrong v. Commonwealth* 217
18. **Acts Occurring in Different Counties—Jurisdiction.**—The court of a county, in which a crime is wholly committed alone has jurisdiction of it, but, if the acts and effects constituting a

CRIMINAL LAW—Continued—

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- crime occur in different counties, the courts of either have jurisdiction of the crime. *Ellison v. Commonwealth*..... 305
19. Setting Aside Verdict.—A verdict of guilt, in a criminal case will not be set aside on the ground of the insufficiency of the evidence to support it, unless it be so flagrantly against the weight of the evidence as to indicate that it was returned through passion and prejudice on the part of the jury; and this rule applies where the evidence is only circumstantial, in which case the verdict will be upheld unless the circumstances proven are such as to have but little or very remote probative qualities and amount to no more than a mere suspicion of guilt. *Banks v. Commonwealth*. 330
20. Misdemeanor—Presence of Defendant at Trial.—A defendant in an indictment for a misdemeanor has a right to be present at the trial, and it is error to try the cause and to render judgment against him in his absence, unless his absence is voluntary or at least the circumstances do not deny such right to him. *Bates v. Commonwealth*. 338
21. Misdemeanor—Absence of Defendant at Trial.—Upon the calling of an indictment for a misdemeanor, and the defendant, who has been duly brought before the court by proper process, fails to appear, the court will assume that his absence is voluntary, and that he thereby intends to waive his right to be present, where no sufficient legal reason appears to the contrary, and the trial may be had in his absence. *Id.*..... 338
22. Failure of Defendant to Plead to Indictment.—Upon the calling of an indictment for a misdemeanor, the defendant, who is duly before the court by process fails to plead to the indictment, the indictment may be taken as confessed, and a judgment of guilty rendered and the punishment fixed and adjudged, by the court without the intervention of a jury, if the punishment for such offense is definitely fixed by law, but, if the punishment, which may be inflicted for the offense, is not definitely fixed by law, but, is one, within a discretion to be exercised between a maximum and minimum, a jury must be impaneled not to determine the guilt, but to fix the penalty. *Id.*.... 338
23. Account Books—Entries—Evidence.—An account book kept and owned by a person other than the accused, though containing an entry of a date relating to the latter's whereabouts when the crime charged was committed, properly could not be introduced, or its contents read as evidence against him when on trial for the crime. But it was competent for the owner of the book and maker of the entries therein, when testifying as a witness, to refresh his recollection as to the material date shown by the entry in the book by examining the book and entry in the presence of the jury and then state, independently of the book, as was permitted by the court, such date and

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- any fact showing its relevancy to the case known to him.
Edlin v. Commonwealth. 348
24. Instructions.—Where there is no fact or circumstance in the record to show or indicate that defendant in a criminal prosecution acted under his right of self-defense it is not error for the court to refuse an instruction submitting to the jury that defense. *Ison v. Commonwealth.* 376
25. Defendant Charged With Different Offenses—Election.—A defendant who is chargeable with several different acts any one of which, if proven, would sustain a conviction of the crime charged in the indictment, can be tried for only one of the acts at a time, though proof of other acts in corroboration of the act relied upon for a conviction may be heard, and the Commonwealth's attorney should be required to elect which act he will rely upon for a conviction, and if he fails so to do the law makes the election for the Commonwealth of the act of which substantive evidence is first introduced. *Commonwealth v. Stites.* 402
26. Accomplices.—A child 13 years old who is under the domination of her father and who permits or acquiesces in the commission of a crime out of fear of her father and against her will, is not an accomplice of her father in the commission of the crime though she participated in it. *Id.*..... 402
27. Confession.—A confession of the defendant made out of court is sufficient in the absence of other proof of the commission of the crime to sustain a conviction. *Id.*..... 402
28. Reasonable Doubt—Instructions.—In giving an instruction on reasonable doubt in criminal cases the trial court should follow closely the language of section 238, Criminal Code, and should not enlarge thereon by saying the law presumes the innocence of the defendant and that it is the duty of the jury, if it can reasonably do so, to reconcile all of the facts and circumstances of the case with that presumption, for this comes more properly in the argument of counsel. *Id.*..... 402
29. Indictment Improperly Charging Separate Offenses.—Although an indictment may improperly charge the defendant with the commission of two or more separate offenses, where the attorney for the Commonwealth elects to prosecute him for only one of the offenses and his trial is confined to that single offense an error committed by the trial court in overruling, before such election by the Commonwealth, his demurrer to the indictment was not prejudicial to him. *Mobley v. Commonwealth.* 424
30. Period of Imprisonment Directed by Instruction.—An instruction which erroneously told the jury that the minimum period of imprisonment in jail fixed by the statute for the offense for which the defendant was tried was less than actually prescribed by it, was not prejudicial to him, as the verdict of the jury

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- fixed his imprisonment at the minimum time named in the instruction. *Id.* 424
31. Imprisonment for Less Time Than Fixed by Statute.—The fact that the verdict of the jury, in addition to inflicting upon the defendant a fine as prescribed by the statute, fixed his imprisonment at a shorter time than the minimum limit prescribed by the statute, did not entitle him to a new trial, as he can not complain that his imprisonment was less than that fixed by the statute; and an error, though committed both by the trial court and jury, which did not prejudice the defendant in some substantial right, will not afford ground for reversing the judgment. *Id.* 424
32. Continuance—Affidavits.—The court's refusal to grant a continuance because of absent witnesses (where the affidavit incorporating the testimony of such witnesses is read to the jury) will not be disturbed on appeal, unless from all of the facts and circumstances appearing in the record there was a manifest abuse of discretion by the court in refusing the continuance, by reason of which the party applying did not obtain a fair and just trial. *James v. Commonwealth.* 458
33. New Trial—Instructions.—Excepting errors committed in the rejection or admission of evidence to which proper exceptions have been taken, as shown by the bill of exceptions, complaining party must include in its motion for a new trial any errors committed during the progress of the trial upon which it intends to rely in this court, otherwise they can not be considered on appeal, and except in the matter of instructions this court can not consider errors that appear for the first time in the motion for a new trial. *Finney and Turpin v. Commonwealth.* 536
34. Evidence—Appeal and Error.—In a criminal trial if there is evidence to support the verdict of the jury, and the verdict is not palpably against the weight of the evidence, it will not be disturbed upon the ground that it is contrary to the evidence. *Fleming v. Commonwealth.* 810
35. Evidence—Question for Jury.—In a criminal trial, the weight to be given to the testimony of the witnesses and the circumstances proven, are matters within the province of the jury, in determining what the facts were. *Id.* 810
36. Imprisonment.—Punishment by imprisonment, under the humane conditions prescribed by law, and not disproportionate to the enormity of the offense, in the opinion of reasonable men, is not a cruel punishment within the constitutional inhibition against the imposition of cruel punishment. *Id.* 810

CROSSINGS—See Eminent Domain; Railroads.

CUSTODY—See Appeal and Error, 2; Divorce.

DAMAGES—See Appeal and Error; Bridges; Contracts; Eminent Domain; Municipal Corporations; Railroads; Waters and Water Courses— Page

1. Anticipated Profits—Special Damages.—Anticipated profits are recoverable as special damages for breach of contract for sale of lumber where it is pleaded and proven that same were in contemplation of the parties when the contract was executed. *Hunter v. Wood* 44
2. \$15,000.00 for Loss of Foot Not Excessive.—Considering the increase in the cost of living and the decrease in the purchasing power of a dollar, a verdict for \$15,000.00 for injury to a seven year old boy, resulting in the loss of his foot, was not excessive. *C. & O. R. Co. v. Honaker*..... 125
3. Excessive Damages.—In a suit for personal injuries, a verdict for \$3,800.00 held not excessive. *Louisville R. Co. v. Koob*..... 283
4. Conjectural or Speculative Damages.—Damages which are so conjectural or speculative as to be incapable of approximately accurate ascertainment or so remote and contingent that the parties affected could not reasonably have contemplated they would result, are not recoverable. *Hines, Director General of Railroads v. Denny*..... 416
5. Excessive Damages.—A verdict for damages will not be held to be excessive, unless it appears at first blush to have been caused by passion or prejudice on the part of the jury. *Welch v. Jenkins* 475
6. Action for Personal Injuries—Evidence.—When a verdict in a personal injury action is so large that it can not be sustained unless the injuries are permanent, there must be positive, clear and satisfactory evidence on this issue. *Louisville & Interurban R. Co. v. Murphy*..... 795
7. Excessive Damages—Earning Capacity.—One's earning capacity enters into the question whether such a verdict is excessive, as well as business losses claimed to have been suffered as a result of the injury. But the evidence in this case only shows that the appellee had disposed of his farm and Louisville business, but does not show that it was necessary for him to do so as a result of his injuries, or that he sold either at a loss. *Id.* 795
8. Personal Injuries.—Evidence as to permanency of injuries examined and held not to be clear or satisfactory. *Id.*..... 795

DEATH—See Railroads, 25.

DEBT—See Counties.

DECEIT—See Fraud.

DEEDS—See Reformation of Instruments; Trusts—

1. Mental Capacity—Burden of Proof.—The law looks with suspicion upon the transfers of property by persons mentally or

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- physically infirm, to those having custody of them, and even when parties in good health sustain a confidential relation to each other, the burden is upon the stronger character, who procured an advantage, to show by clear and convincing evidence that the transaction was freely and voluntarily entered into and devoid of inequitable incidents. *Watson v. Watson*..... 270
2. Undue Influence—Burden of Proof.—Where a son, after the death of his father, bought the interests of the other heirs as well as purchased his mother's dower right in the farm and she continued to live with him, being 74 years of age, crippled and afflicted with disease, and being very much disturbed and grieved about the death of her husband, a contract entered into by her with her son while she was on the bed of affliction to support her during the remainder of her life in consideration of \$800.00 cash then paid and all of the property of which she may die the owner, will be set aside at the instance of the proper parties on the ground that the circumstances show undue influence exercised by the son, and an undue advantage obtained by him, which he failed to disprove by clear and convincing evidence under the burden which the law casts upon him under such circumstances. *Id.*..... 270
 3. Reconveyance—Contemporaneous, Collateral Agreement to Convey.—One who sells and conveys land by a general warranty deed without reservation therein can not have a reconveyance of the land in the absence of fraud unless there be a contemporaneous, collateral agreement to reconvey and then only upon clear and convincing proof of the existence and contents of the collateral agreement. *Moberley v. Deatherage*..... 295
 4. Bodily Heirs.—The words "bodily heirs," "heirs of the body," "heirs lawfully begotten of the body," and other similar expressions indicating descending lineal heirs when used in a deed or will are to be construed as words of limitation and not words of purchase, unless a different intention plainly appears from the language of the entire instrument; and if the language is so ambiguous as to be susceptible of two constructions that one will be adopted construing the words as ones of limitation and creating an absolute estate in the named grantee or devisee. *Wilson v. Woodward*..... 326
 5. Bodily Heirs.—The deed involved in this case as set out in the opinion examined and—Held that the named grantee therein took an absolute estate and that the words "bodily heirs" as applied to her were words of limitation and not of purchase. *Id.* 326
 6. Construction—Intention of Grantor.—Where the granting clause of a deed and the habendum are in irreconcilable conflict and there is nothing in the instrument from which the real intention of the grantor may be gathered, the granting clause will prevail. *Granger v. Edwards*..... 408

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7. Cancellation.—A father conveyed land to his son in consideration of support. The son died. The father brought suit against his son's widow and children to cancel the deed: Held, that as the sole object of the suit was to set aside the deed, and not to subject the son's estate to any personal liability, it was not necessary to make the son's administrator a party to the suit. *Webb v. Webb*..... 574
8. Alteration—Title.—Where a deed is executed and delivered to one and is accepted by him, and he pays the cash consideration therefor and executes his notes for the deferred payments, but thereafter causes the said deed to be so altered that another is made to appear to be the grantee, and there is no re-execution or re-acknowledgment of the deed thereafter, the first grantee is not divested of title. *Lacey v. Layne*. 667
9. Action for Purchase Money—Right to Judgment Where Grantee Makes no Defense.—Where grantors allege that the grantee agreed to assume the payment of an outstanding mortgage as a part of the consideration for the deed, and the grantee made no defense, grantors were entitled to a personal judgment against him. *White Grocery Co. v. Moore; Moore v. Snyder* 671
10. Construction.—While there is a distinction in the technical meaning of the words "reservation" and "exception" as used in deeds, no matter which word is used the deed will be given that meaning which it is manifest from the whole instrument was intended by the parties. *Rowland v. Lilly's Heirs*..... 757
11. Reservation Defined.—A reservation is a clause whereby the grantor reserves some new thing to himself out of that which he granted before, and an exception is the exclusion from the conveyance of part of the thing granted which remains in the grantor by virtue of his original title and is a thing in esse at the time. *Id.* 757
12. Bond for Title.—The provisions of a title bond will be presumed to have been merged into a subsequent conveyance between the same parties of the same land. *Id.*..... 757
13. Construction—Exception.—Where a vendor and a vendee are each the owner of a one-half undivided interest in land, and the vendor, in a conveyance to the vendee of his interest therein, "reserves from the aforesaid land all the minerals," it is an exception out of the interest of the vendor of his one-half of the minerals and does not operate to divest the vendee of his one-half undivided interest in the minerals theretofore owned by him. *Id.* 757
14. Exceptions.—A grantor can not except out of the operation of his conveyance an interest in the land conveyed to which he has no title, and if he undertakes to do so the exception will be void as to the excess over his existing interest. *Id.*..... 757

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15. Conveyance Between Persons in Confidential Relation—Agreement to Support—Valuable Consideration—Burden of Proof.—The law looks with suspicion upon transactions between persons sustaining confidential relations, and where a mother seventy-one years of age, having other children who have an equal claim on her bounty, conveys to her daughter and son-in-law who live with her, her life estate in a farm and all her personal property, the burden is on the grantees to show that the transaction was freely and voluntarily made, and devoid of any vice rendering it inequitable or unfair; and the agreement by the grantees to support the grantor and pay her funeral expenses will not be regarded as a valuable consideration sufficient to relieve them of the burden of showing the fairness of the transaction, where the grantor's estate was amply sufficient for all her wants, and she was in no way dependent on the grantees for support, and the grantees were the real beneficiaries of the arrangement. *Tucker v. Cornett's Admr.* 786
16. Undue Influence—Sufficiency of Evidence.—In a suit to set aside a deed on the ground of undue influence, evidence held to sustain a verdict for plaintiffs. *Id.*..... 786

DE JURE OFFICERS—See Officers.

DELEGATION—See Constitutional Law; Municipal Corporations, 19.

DEMURRER—See Infants.

DEPOSITIONS—See Appeal and Error—

Manner of Taking—Interrogatories.—Civil Code of Practice, section 574, requiring depositions to be taken on interrogatories when all the parties against whom it is to be read be defendants under disability other than coverture, or infancy and coverture combined, does not apply where one of the defendants is an adult. *Webb v. Webb*..... 574

DESCENT AND DISTRIBUTION—

1. Liens for Debts Against Estate.—In this action brought by a creditor under Civil Code, sections 428-429, to subject the real estate of the deceased debtor to his lien debt thereon, and to which the decedent's widow and infant children were made defendants, as it was neither alleged in the petition nor proved that the decedent left no personal property out of which the debt or some part thereof could be paid, the circuit court, in the absence of such a showing, was without power to adjudge a sale of the real estate for the debt sued

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- on. Nothing is to be presumed against, nor taken as confessed by, an infant. *Hill v. Adams*. 224
2. Indivisi**bi**lity of Land—Description—Evidence.—The description of the land contained in the petition and exhibits filed therewith, and depositions of witnesses sufficiently showed the indivisi**bi**lity of the land and necessity for selling it as a whole. Even in the absence of proof, if the question of the divisi**bi**lity or indivisi**bi**lity of the land can be determined by the circuit court from the description thereof contained in the petition and disclosed by the title papers filed therewith, the judgment of sale will not on appeal be reversed because of the court's refusal to require proof as to the matter. *Id.*..... 224
3. Attorney's Fees.—Where the attorneys for the devisees who brought a suit to settle and divide the estate succeeded in charging the administrator with a substantial sum it is proper to allow plaintiffs a reasonable attorney's fee, to be paid out of the funds of the estate. *Fischer, Admr. v. Lange* 699

DESCRIPTION—See Descent and Distribution; Forcible Entry and Detainer.

DISCRETION—See Assault and Battery.

DISMISSAL—See Appeal and Error; Exceptions, Bill of.

DIVORCE—See Appeal and Error, 2—

1. Appeal—Appellate Jurisdiction.—Though the Court of Appeals is without power to reverse a judgment of divorce, it may review the judgment in other respects where the amount or rights involved are such as to confer jurisdiction. *Hoffman v. Hoffman*. 13
2. Custody of Children.—In a case of divorce it is a settled practice to award children of tender years, especially girls, to their mother, unless it be made to appear that she is an unsuitable person. *Id.* 13
3. Right to Alimony.—Where a divorce is granted, the wife is entitled to alimony, though not free from blame, where no moral delinquency on her part is shown, and it appears that the husband was a substantial participant in the shortcomings which led to the separation. *Id.*..... 13
4. Alimony—Maintenance of Children.—Where the husband has an income of \$16.00 a week from his business and owns five pieces of property which are worth several hundred dollars more than the encumbrances thereon, an allowance of \$11.00 a week for alimony and maintenance of two infant children will not be increased or decreased in view of the fact that the chancellor may modify the allowance in case the circumstances of the parties require it. *Id.*..... 13

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5. Attorney's Fee—Liability of Husband.—Under section 900, Kentucky Statutes, the husband, in actions for alimony and divorce, is liable for all costs, including a reasonable compensation to his wife's attorney, unless it be made to appear, first, that the wife was in fault, and, second, that she has ample estate to pay the costs. Id..... 13
6. Attorney's Fee—Liability of Husband—Sufficiency of Wife's Estate.—Where there is an encumbrance on the wife's property of \$750.00, and it does not appear whether the interest thereon has been kept up and the taxes paid, or that the property would bring any substantial sum in excess of the debt and the interest, it can not be said that she has ample estate to pay the costs, and the husband will be held liable for her attorney's fee. Id. 13
7. Divorce From Bed and Board—Restoration of Property.—Where a divorce was granted merely from bed and board, an order directing that the parties restore to each other all the property which either may have obtained, directly or indirectly, from the other during the marriage, and in consideration or by reason thereof, was error, such an order of restoration not being authorized by the statute and Code except in case of absolute divorce. Id..... 13
8. Review of Alimony.—This court is without power to reverse a judgment of divorce, but the evidence upon that question will be reviewed when necessary to determine the question of alimony of which we have revisionary control. *Walter v. Walter*. 49
9. Duty of Husband to Provide Home.—It is both the right and the duty of the husband to provide a home for himself and wife; and, when reasonably exercised to decide where it shall be located, but he can not exercise the right of choice of location and impose upon the wife the duty of providing a suitable home at the place of his choice when he is amply able to do so. Id. 49
10. Duty of Husband to Provide Home.—The wife does not have to sell her home left her by a former husband in one place and with the proceeds purchase a new home in another place where the husband reasonably elects to reside; and where he leaves her and lives apart from her for one year because she will not do so and does not provide or offer to provide her a home where he elects to reside with his own means although amply able to do so, the court did not err in granting her a divorce and alimony. Id. 49
11. Alimony.—An allowance to the wife of \$100.00 a month alimony was not excessive upon the evidence in this case. Id. 49
12. Attorney's Fees.—An allowance of \$500.00 to attorneys for his wife was not excessive and was properly allowed as costs against the husband since under our statutes the husband is

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- required to pay same unless the wife is both in fault and has ample means of her own, and the wife here was not in fault. *Id.* 49
13. Attorneys' Fees.—The complaint of the wife that the allowance to her and her attorneys are too small can not be considered since she has not prosecuted a cross appeal. *Id.*..... 49
14. Domicile of Wife.—The general rule that the residence or domicile of the wife is that of her husband does not prevail in divorce proceedings where the wife may establish for herself a residence or domicile which will govern her right to proceed against her husband to procure a cancellation of the bonds of matrimony, and if she retains the matrimonial domicile after her husband has abandoned her she will be deemed to have elected to make it her separate residence and domicile. *George v. George* 706
15. Grounds—Domicile of Wife.—Under our statute (section 2120) before a plaintiff in a divorce suit may maintain the action in this state and before the court will take jurisdiction of the cause it must be alleged and proven that plaintiff has been a continuous resident of this state for at least one year before filing the suit and that she or he was a resident of this state when the cause of action accrued, and if it accrued out of this state it must be alleged and proven that it was a ground for divorce under the laws of the state where it occurred. *Id.* 706
16. Actual Residence.—Residence within the meaning of the statute means "actual residence," *animus marendi*, but where the marital domicile was in this state and the parties were residents of this state at the time the cause of action occurred, a temporary absence from the state with no intention to abandon it as a residence will not destroy the "actual residence" in this state. *Id.* 706
17. Alimony.—The above rules, however, do not apply in suits for alimony only, which may be maintained independently of one for a divorce. Such independent alimony suits are transitory in their nature and are furnished to the wife as a remedy to compel the husband to discharge his marital obligation to maintain and support her, and that court where the husband may be found and served with process has jurisdiction to hear and determine the controversy. *Id.* 706
18. Grounds—Living Apart Without Cohabitation.—The ground for divorce of "living apart without any cohabitation for five consecutive years next before the application" occurs where the separation took place and not at the place where the husband located after the separation, and where he resided until the expiration of the time. *Id.* 706

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Special Benefits.—Special benefits arising from the construction of a ditch for which a landowner may be assessed as distinguished from general benefits for which he may not be assessed, are those which increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. *Henderson Cotton Mills v. Trigg, Sheriff.* 411

EASEMENTS—See Waters and Water Courses—

Prescriptive Use—Erection of Gates.—A passway may be established by prescription and when established its condition can not be altered so as to reduce the rights of the claimant without his consent, and if the passway be set off by fencing so as to make a lane and no gates have been placed upon it during its establishment by user, none can be placed there by the owner of the servient estate without the consent of the owner of the dominant estate. *Bridwell v. Beerman.* 227

EDUCATION—See Schools and School Districts.**ELECTIONS—See Counties; Municipal Corporations.****EMBEZZLEMENT—**

Defense That Corporation Was Not Authorized to do Business in State Not Available.—It is no defense to a charge of embezzlement against an agent of a corporation that the corporation was not authorized to transact business in the state in which the embezzlement occurred. *Sebree v. Commonwealth.* 164

EMINENT DOMAIN—See Appeal and Error 17—

1. **Street Extension—Necessity—Public Use.**—The necessity for extending or opening streets as well as the necessity for condemning rights of way, is a matter which has been confided to the decision of the municipal authorities, and their judgment is conclusive upon the courts unless it be made to appear that the use was palpably private, or the necessity for the taking was without any reasonable foundation. *L. & N. R. Co. v. City of Louisville.* 214
2. **Extension of Streets—Necessity—Evidence—Admissibility.**—In a proceeding by a city to condemn a crossing over a railroad right of way for the purpose of extending a street to connect with another street, evidence that there were other ways, both near and remote, by which the other street and property in that section could be reached, and that with the proposed extension the blocks in that section would not be as long as they were in other sections of the city, was properly rejected as not being sufficient to authorize the court to

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- substitute its judgment for that of the municipal authorities on the question of necessity. *Id.* 214
3. Crossings—Condemnation—Measure of Damages.—In a proceeding by a city to condemn a crossing over a railroad right of way for a street extension the measure of the railroad company's damages is the difference in value between the exclusive and the joint use of its right of way. *Id.* 214
4. Street Crossing Over Railroad—Condemnation—Damages—Evidence.—In a proceeding by a city to acquire a street crossing over a railroad right of way, evidence examined and held that a finding of \$250.00 as damages to the railroad company was not flagrantly against the evidence. *Id.* 214

ESTATES—See Descent and Distribution; Executors and Administrators.

ESTOPPEL—See Bridges; Injunction; Vendor and Purchaser—

Estoppel must be pleaded. *Lacey v. Layne*..... 667

EVIDENCE—See Appeal and Error; Criminal Law; Contracts; Damages; Descent and Distribution; Eminent Domain; False Pretenses; Forcible Entry and Detainer; Fraudulent Conveyances; Incest; Intoxicating Liquors; Negligence; Nuisance; Railroads; Receiving Stolen Goods; Robbery; Trial; Trusts—

1. Parol Evidence.—Parol evidence of the contents of a written instrument is never admissible in the absence of proof that the instrument itself can not be produced. *Baird & Williams v. Pewitt*. 323
2. Parol Evidence.—The admission of such parol evidence held to be prejudicial where the only other evidence upon the question at issue was the statement of a witness based largely if not entirely upon his recollection of the contents of the written instrument. *Id.* 323

EXCEPTIONS—See Deeds.

EXCEPTIONS, BILL OF—See Appeal and Error—

1. Bystanders.—Where the trial judge refuses to sign a bill of exceptions tendered in time, a bystanders' bill should be prepared and certified. *Striger, Exor. v. Carter*..... 319
2. Tender of—Signing.—A party tendering a bill of exceptions in time is not responsible for the court's delay in signing it, and in a direct appeal, a bill so tendered, though not signed, will be considered as properly in the record. *Id.*..... 319
3. When Appeal Will be Dismissed.—Where the record on appeal is not filed in time and no extension of time for that purpose granted, the appeal on motion will be dismissed

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- though the filing of the bill of exceptions was delayed by appellee or by causes beyond appellant's control. *Id.*..... 319
4. **Right of Appeal Lost.**—Where a bill of exceptions is filed in time and the lower court fails to act upon it and no application is made to relieve the situation and no supersedeas issued, after the lapse of four years, the right of appeal and the right to relief is lost and the judgment will be treated the same as if no appeal had been sought. *Id.*..... 319
5. **Bystanders' Bill.**—Where, after overruling the motion of an unsuccessful litigant for a new trial, granting him an appeal and giving him until a day certain of the succeeding term to file a bill of exceptions, the judge of the circuit court who presided on the trial and overruled the motion for a new trial, dies within the time fixed for filing the bill of exceptions, the filing of a bystanders' bill is allowed by Civil Code, sec. 337, subsection 5. *Elkhorn Coal Corporation v. Guttadora.*..... 770

EXCESSIVE DAMAGES—See Damages.**EXECUTION—See Wills.****EXECUTORS AND ADMINISTRATORS—See Courts—**

1. **Appointment, Qualification and Tenure.**—Decedent died intestate in January, 1918, two terms of the county court having been held after his decease and no one having applied for appointment as administrator under Ky. Stats., sec. 3896, the court was authorized under Ky. Stats., 3896, to appoint an administrator for the estate upon motion of a creditor. *Equitable Trust Co. of Dover, Ky., Admr. v. Bayes, Admr.*..... 91
2. **Claims of Executors and Administrators—Attorneys' Fees.**—Where an executor suing as such and in his own right attempts to establish against the other devisees his right as a devisee under the will, to nearly all of the estate, and the other devisees employ their own counsel and defeat this claim, he is not entitled to an allowance from the funds of the estate to reimburse him for fees paid to his attorneys, even though some part of the services rendered by his attorneys were such as would have been required by a disinterested executor and for which reimbursement could have been claimed out of the estate. *Shields v. Shields.* 109
3. **Allowance.**—An allowance made to an executor for selling land and distributing the proceeds in obedience to the will and a judgment of court was proper. *Id.* 109
4. **Services—Fees.**—It was not error to refuse to allow the executor and his counsel additional fees growing out of supplemental proceedings involving the estate, where a prior allowance is deemed ample to cover all services rendered. *Striger, Exr. v. Carter.* 319

EXECUTORS AND ADMINISTRATORS—Continued—

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5. Purchaser of Property at Own Sale.—It is well established as a general rule that an executor or administrator can not become the purchaser at his own sale of the property of his decedent. The rule precludes the representative not only from purchasing outright whether for himself or as agent for another, but also from being interested in a purchase at a sale by him made by another for him. And the rule applies whether the sale be by judicial decree or under a power of sale conferred upon the fiduciary by a will or other instrument of writing. *Naylor v. Thomas, Trustee*. 588
6. Purchase of Property at Own Sale.—The reason supporting the rule is, that to permit the fiduciary having the control and power to dispose of the trust property to purchase it from himself, would allow him to create in himself an interest opposite to that of the party or parties for whom he acts, and also a conflict between the self interest and integrity of the fiduciary, thereby furnishing both motive and opportunity for his profiting upon his relations to the property as a trustee to the disadvantage or loss of those it is his duty to protect. *Id.* 588
7. Purchase at Own Sale.—This rule applies not only to sales at which the executor or administrator becomes the purchaser of his decedent's property, but likewise to all sales of such property where the purchaser, though having no connection therewith as a fiduciary, is charged with the performance of a duty with reference thereto which is inconsistent with the character of purchaser. *Id.* 588
8. Purchase of Property at Own Sale.—A purchaser of property of his decedent's estate by an executor or administrator, at his own sale thereof, unless tainted with actual fraud will not be declared void, but merely voidable at the option of those interested in the estate, upon whose application, if seasonably made, a court of equity will either set aside the sale or declare the purchase a trust for the benefit of all to whom the estate should go. *Id.* 588
9. Purchase of Property at Own Sale.—As in this case the purchase of a farm by the executor at a decretal sale made by him of his testator's real estate, though reported to the court as having been made as agent for his (the executor's) wife, came within the inhibition of the rule, *supra*, the action of the chancellor in sustaining the exceptions filed by certain of the parties in interest to the report of sale and setting the sale aside was not error. *Id.* 588
10. Costs of Settlement of Estate.—An administrator will not be charged on final settlement of his estate for uncollected rents of the property of his decedent where he has acted with reasonable diligence and business prudence in the management of the particular character of property in his charge. *Fischer, Admr. v. Lange* 699

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11. Personal Representative Chargeable With Interest.—A personal representative will not be chargeable with interest upon assets in his hands for two years after his appointment, unless he actually collected interest thereon or could have done so in the exercise of reasonable care; but after two years he will be chargeable with such interest, unless he can show that because of peculiar and uncontrollable circumstances it would be inequitable to charge him therewith. *Farmers Bank & Trust Co., Admr. v. Stanley* 762
12. Attorneys' Fees.—A litigant in settlement suits who employs attorneys and whose services resulted in recovering assets for the estate to the benefit of interested parties, or whose services resulted in defeating claims against the estate, likewise beneficial to the parties, is entitled to a reasonable attorney's fee to be paid out of the trust fund. *Id.* 762

EXHIBITS—See Pleading.

FALSE PRETENSES—See Criminal Law; Indictment and Information—

1. Obtaining Money Under False Pretenses.—The test under Ky. Stats., sec. 1208, as to obtaining money by false pretenses is not limited to the inquiry of whether the means employed by accused must be calculated to deceive persons of ordinary prudence and discretion since the protection of the statute was intended as well for the credulous, the careless, the ignorant and the helpless. *Finney & Turpin v. Commonwealth* 536
2. Obtaining Money Under False Pretenses.—Whether the false representations are such as are calculated to deceive one of the capacity and understanding, and in the situation of the prosecuting witness, is a question of fact to be found by the jury. *Id.* 536
3. Obtaining Money Under False Pretenses.—Where the evidence shows that one of the accused, with the knowledge and concurrence of the other, makes the false representations charged, the conviction of both is warranted. *Id.* 536
4. Obtaining Money Under False Pretenses.—An indictment which charges that the prosecuting witness has been induced to part with money because of false representations made to her by accused about the pendency of a secret lawsuit and that relying upon said representations as true she paid said money to accused is good on demurrer. *Finney and Turpin v. Commonwealth.* 536
5. Indictment and Information.—An indictment accusing the defendant of the offense of procuring money or property by fraudulent pretenses should specially aver the falsity of the pretenses alleged, it not being sufficient to aver only that the pretenses were false and known by the defendant to be

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- so. The indictment should follow the rule required in indictments for perjury and false swearing in this respect. Commonwealth v. Wilson. 813
6. Competency of Wife to Testify Against Husband.—The wife of the defendant in an indictment accusing him of obtaining money or property under false pretenses is a competent witness against him where the property obtained is that of the wife and the false pretenses were made while the husband was acting as agent for the wife, and consisted in misrepresenting the instructions which she had given him as her agent. Id. 813

FEES—See Executors and Administrators.

FINAL ORDER—See Appeal and Error; Judgment.

FINDINGS—See Mines and Minerals.

FINES—See Pardon.

FIRES—See Negligence.

FISCAL COURTS—See Counties.

FORCIBLE ENTRY AND DETAINER—

1. Form of Writ.—A warrant of forcible detainer is not a pleading of the complainant had is sufficient if it conforms substantially with the form prescribed by the Code. Jolly v. Gilbert. 1
2. Form of Writ.—Such a warrant is therefore not defective because it does not allege a refusal after demand to surrender possession although proof of such a refusal is necessary to a judgment of restitution. Id. 1
3. Description of Property.—A description of the property in the warrant as, "one house and lot at No. 603 Ann street, in Owensboro, Daviess County, Kentucky," is sufficient. Id. 1
4. Evidence.—Evidence examined and held to show a tenancy from month to month and as the tenant refused to surrender possession at the end of the month forcible detainer proceedings were maintainable. Berry v. Hale. 510

FORFEITURES—See Mines and Minerals; Taxation.

FRANCHISES—See Gas.

FRAUD—

1. Actionable Fraud—Want of Consideration.—A promise unsupported by a consideration and to be performed in the future made by a son to his aged father held to be actionable

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- fraud where it was fraudulently made by the son to defeat his father's right to redeem his land purchased by the son at execution sale for less than one-third of its value, and was relied upon by the father until his statutory right of redemption had expired. *Daniel v. Daniel*. 210
2. Actionable Fraud—Deceit.—To constitute actionable fraud it must appear (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. It is not necessary that the fraudulent misrepresentation be in writing; as in such case the right of action arises out of the fraud and deceit of the defendant, it is not affected by the statute of frauds. *Hicks v. Wallace*. 287
3. Misrepresentation.—The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished, the means of accomplishing it are immaterial. *Id.*..... 287
4. Misrepresentation.—The rule requiring investigation by the person to whom a misrepresentation is made, does not apply if any relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other; but in such case the latter is under a duty to make full and truthful disclosure of all material facts, and is liable for fraudulent misrepresentation or concealment. *Id.* 287

FRAUDS, STATUTE OF—

1. Contracts Within Statute.—A verbal contract, or lease of real estate for a term of five years is within the statute of frauds, Ky. Stats., sec. 470, which provides that no action shall be brought to charge any person upon any lease on real estate for a term of more than one year, or upon any contract not to be performed within one year from the making thereof, unless the contract, agreement or assurance or some memorandum thereof be in writing signed by the party to be charged therewith. *C. N. O. & T. P. R. Co. v. Depot Lunch Co.* 121
2. Agreements Not to be Performed Within a Year.—A contract not in writing and which is not to be performed within a year is within the statute of frauds and unenforceable. *Randolph v. Castle*. 776
3. Part Performance Will Not Take Case Out of Statute.—Where one undertakes to mine and load coal for another for three years but the contract is not in writing, and he performs some of the work and receives full compensation for the same

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according to the contract, and part performance does not take the case out of the statute of frauds if that which remains to be done is not capable of performance within one year. In such case the plaintiff can not recover for the loss sustained by him if there was no resulting benefit to defendant. *Id.*..... 776

FRAUDULENT CONVEYANCES—

Preference—Evidence.—In an action by creditors of an insolvent debtor, under section 1910, Ky. Stats., attacking certain alleged preferential sales and transfers by the debtor to certain other creditors, the preponderance of the evidence shows that the defendant creditors did not get any preference over the general creditors, and do not claim any interest in the personal property alleged to have been sold and transferred to them or the proceeds thereof, and the action was properly dismissed as to them. *Smith v. Massey.* 276

FUNERAL EXPENSES—See Wills.

GAS—See Mines and Minerals—

1. Companies Operating Under Franchise from City—Duty of Under Contract.—If a gas company or public service corporation is occupying the streets of a city under a franchise contract its duties and liabilities will be determined by the terms of the contract if the contract contains provisions respecting its duties. *Humphreys v. Central Kentucky Gas Co.*..... 733
2. Companies Operating Under Franchise from City—Implied Contract to Supply Gas.—Where a gas company obtained a franchise from a city to use its streets for the purpose of supplying its people with natural gas and the contract between the city and the gas company did not provide how much gas in quantity or pressure should be furnished to customers, the law will imply a contract on its part to exercise reasonable and practicable diligence and care to supply customers with a sufficient quantity and pressure of gas. *Id.* 733
3. Liability of Company to Consumer Under Implied Contract.—Where a gas company is furnishing gas under a franchise from a city and there is no contract with the consumer or the city as to the quantity or pressure to be furnished the consumer may bring a suit against it on the implied contract it was under to perform the services for which it sought and obtained the franchise, and in such action may recover damages for loss suffered through its negligence and failure to fulfill its implied obligation. *Id.* 733
4. Duty and Liability to Consumer Under Implied Contract.—Where a gas company furnishing natural gas for heating purposes under a franchise granted by a city fails to furnish the

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consumer with the requisite quantity or pressure of gas needed in his home or his business and injury or loss results therefrom the consumer may have an action against the company for damages. *Id.* 733

5. Duty and Liability of Company Under Implied Contract—Notice of Failure to Furnish Gas.—Where a gas company is under an implied duty to furnish gas to a consumer and it fails to fulfill its implied duty the gas company must have notice of the failure or it can not be made liable in an action brought by the consumer to recover damages for loss sustained on account of failure. *Id.* 733

GATES—See Easements.

GENERAL WELFARE CLAUSE—See Municipal Corporations, 22.

GOVERNMENTAL OPERATION—See Master and Servant.

GROUNDS—See Divorce; Mandamus.

HARMLESS ERROR—See Criminal Law, 4.

HEALTH—See Municipal Corporations.

HEIRS—See Wills.

HIGHWAYS—See Appeal and Error; Counties; States.

1. Proceedings for Alteration—Notice to Landowners Before Order is Entered Selecting Proposed Route.—Under Kentucky Statutes, section 4301, providing that "if the court decides to undertake the proposed work, the county judge shall appoint a day for hearing the parties interested and cause notice thereof to be given to the proprietors and tenants of the property which would have to be taken or injured to show cause against the same," it is not necessary that the court should give such notice before selecting the proposed route. The order is merely interlocutory and subject to change after the hearing, and all that is necessary is, that those affected be given an opportunity to be heard. *Vaughan v. Helstand*..... 365
2. Proceedings for Alteration—Sufficiency of Report of Viewers on Disadvantages to Landowners.—Under Kentucky Statutes, section 4301, providing that the viewers shall report in writing the advantages and disadvantages, which, in their opinion, will result as well to individuals as to the public from the proposed work, etc., a report by the viewers fixing the amount of damages to be paid to the landowners was a substantial compliance with the statute on the question of disadvantages. *Id.* 365
3. Driver of Motor Car Must Maintain Lookout.—A driver of a motor car upon a public highway must keep a lookout ahead

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- for other vehicles and persons upon the road; sound warning signals at all points where he can not see the road for a distance of 300 feet in advance; keep to the right of the road in the direction he is driving and keep his vehicle under control. *E. P. Barnes & Bro. v. Eastin, Admr.*..... 392
4. When Driver of Motor Car Guilty of Gross Negligence.—A driver of a motor car who in an effort to pass a car in front of him traveling in the same direction, turns his vehicle to the left of the road and into a portion of the road usually traveled by persons driving vehicles in the opposite direction and continues to speed ahead though engulfed in a cloud of dust so dense he can not see the road or other vehicles approaching, is guilty of gross negligence. *Id.*..... 392
 5. Duty of Driver of Motor Car.—A driver of a motor car who goes into a cloud of dust so thick he can not see the road should bring his car to a standstill and sound a warning notifying persons of his presence. *Id.*..... 392
 6. Passenger as Guest of Driver of Motor Car.—A passenger riding as the guest of the driver of an automobile is not guilty of contributory negligence precluding her recovery if the accident which brings about her injury results from the concurring negligence of the driver of the automobile in which she is riding and that of the driver of a truck traveling in the opposite direction. *Id.* 392
 7. Responsibility of Owner of Truck.—A truck which is owned and used by a mercantile firm for and in the delivery of goods and driven by the firm's employee under the direction and control of the general manager of the firm, the driver acting for and under the direction of the general manager and working upon the time of the firm, is in the service of the firm and the firm is responsible for his wrongful acts committed in the performance of his duties. *Id.* 392
 8. Negligence of Driver of Motor Vehicle—Guest Riding Therein.—The negligence of the driver of an automobile is not ordinarily imputed to the guest riding therein. *Veach's Admr. v. Louisville & Interurban R. Co.*..... 678

HUSBAND AND WIFE—See Divorce—

1. Alienating Affections.—An action or cause of action for alienation of the affections of a spouse does not survive the death of the party injured or injuring. *Gross' Admr. v. Ledford.*..... 526
2. Expression of Purpose to Convey—Trust Relation.—The expression of a purpose by a wife to convey at some time in the future land to her husband is evidence of no purpose upon her part to create any trust relation, or any purpose to hold the land as security for a debt, and carries with it no legal or moral obligation. *Lacey v. Layne.* 667

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3. Wife's Separate Estate—Mortgage—Consent of Husband.—
The mortgage of her land by a married woman is void unless her husband unites in the mortgage. *White Grocery Co. v. Moore*; *Moore v. Synder*. 671

IMPEACHMENT—See Statutes; Witnesses.

IMPLIED CONTRACTS—See Gas.

IMPRISONMENT—See Criminal Law, 31.

IMPROVEMENTS—See Life Estates.

INCEST—See Criminal Law—

Relationship and Knowledge—Evidence.—A charge of incest against a father, committed with his daughter, may be upheld and a conviction sustained upon the evidence of the daughter alone, she not being an accomplice; but in this case there were corroborating circumstances. (*Whittaker v. Com.*, 95 Ky. 632.) *Craig v. Commonwealth*. 198

INDEBTEDNESS—See Municipal Corporations; States.

INDICTMENT AND INFORMATION—See Criminal Law; False Pretenses; Receivers; Receiving Stolen Goods.

INFANTS—See Appeal and Error; Judgment—

1. Juvenile Delinquents.—The offense designated by law of which a county court may convict a male child seventeen years of age or under, or a female child eighteen years of age or under, is that of being a delinquent as described by section 331e, subsection 1, Kentucky Statutes, and such child the county court may in its discretion sentence to confinement in the house of reform. *Lang, Judge v. Commonwealth*. 29
2. Juvenile Delinquents.—The child which may be indicted upon a charge of guilt of a felony, as mentioned in chapter 26, Session Acts, 1914, is one, who on account of the offenses, and characteristics, when, having been brought before the county court, the latter court has in its discretion transferred to the circuit court to be proceeded against in accordance, with the administration of the criminal laws of the state, and who, if convicted of a felony, will be sentenced by the circuit court. *Id.* 29
3. Indivisible Property—Sale of.—Where the interest of an infant in real property was sold because of its indivisibility, there being no exceptions to the report of the commissioners, the rights of appellants are concluded in their claim upon appeal that the property is divisible. *Gray's Guardian v. Gray*. 75

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4. Sale of Indivisible Property—Correction of Judgment.—Where an infant's interest in real property was ordered sold because of its indivisibility there should have been adjudged a lien for an amount incurred for street improvement, and the judgment to the extent of the lien should be corrected. *Id.*..... 75
5. Service—Sufficiency.—Where the petition which was sworn to showed that their father was dead and that their mother was their guardian, service on the mother of a copy of a summons addressed to the mother and her infant children under fourteen years of age was sufficient under Civil Code of Practice, section 52, to bring the infants before the court, notwithstanding the fact that the officer's return did not show that the summons was served on the mother as the guardian and mother of the infant children, and notwithstanding the fact that a separate copy for each infant was not served on her. *Webb v. Webb.* 574
6. Process.—When the father of an infant defendant, under fourteen years of age is dead, and he has no guardian, and the mother of the infant is living and is also a defendant, the service of a summons upon the mother, containing the name of the infant as a defendant to the action, is a service in substantial compliance with section 52, Civil Code, and brings the infant before the court. *Johnson v. Carroll.*..... 689
7. Right to Sue—Demurrer.—Where, in an action of an infant by his next friend, the latter's residence in this state, his freedom from disability and right to sue for the infant are neither stated in the petition, verified by his oath, nor in an affidavit from him accompanying the petition, the absence from the record of such a showing of his right to sue for the infant may be objected to by special demurrer or by a motion to dismiss. But in either case the objection must be made before the filing of an answer by the defendant presenting his defense, otherwise it will be regarded as waived. *Elkhorn Coal Corporation v. Guttadora.* 770
8. Pleading.—The ruling of the trial court permitting the appellee, two years after the institution of the action by next friend, to file an amended petition alleging his arrival at twenty-one years of age and right to maintain the action in his own name alone, was not error. *Id.*..... 770

INJUNCTION—See Mandamus; Mines and Minerals—

1. Restraint Upon Completion of Building.—The owner of the surface of the property will not be enjoined at the instance of a coal company from the erection of a building where the coal company only owns the mineral rights in the property unless such restraint is necessary in the operation of its mines. *Imperial Elkhorn Coal Co. v. Webb.* 41

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2. What Mining Privileges Include.—Mining privileges include the right to go upon the land and operate for coal, take out and sell the product, and do all the things reasonably incident to that work. *Id.* 41
3. Enjoyment of Surface Owner of Mineral Lands.—The surface owner has the right to enjoy the lands free from annoyance, except such as reasonably arises from the opening, exploration, mining and marketing of the minerals granted. *Id.*..... 41
4. Opinion by One Judge Not Law of Case on Subsequent Appeal—Estoppel.—An opinion of a member of this court ordering or dissolving a temporary injunction, pursuant to the provisions of section 296 of the Civil Code, although concurred in by a majority of the court and the opinion ordered published, does not become the law of the case in a subsequent appeal on the merits after trial below, and is therefore not binding as an estoppel upon the parties nor upon this court under the "law of the case" rule. *Watkins v. Pinkston.* 455
5. Officers May be Enjoined From Doing Ministerial Act.—An officer, even a judge of a court, may be enjoined from doing a mere ministerial act in the performance of his duties, such as the entry of a copy of a certificate of an election, or result of an election on his order books. *Seller v. Dillon, County Clerk.* 779

INNUEENDO—See Libel and Slander.

INSTRUCTIONS—See Appeal and Error; Contracts; Criminal Law; Railroads; Street Railroads; Trial; Waters and Water Courses.

INSURANCE—

Fire Insurance—

1. Assessments.—Insured under a policy of insurance issued by an assessment company is liable for assessments made within statutory limit to create a fund with which to pay accrued losses and expenses. *Providence Mining Co. v. Hind, Receiver.* 445
2. Assessments.—Where insured's president acted as agent for an assessment insurance company, and later turned over the agency to employes of insured with instructions to place renewals for insurance in the company for which they were acting as agents, insured can not refuse to pay assessments levied on the grounds that it did not sign the application for the insurance or that its employes had no authority to sign said application. *Id.* 445
3. Assessments.—It is no defense to a demand for assessments under a policy of insurance that insured did not know the poli-

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- cies were in an assessment company where insured's president and its employees acted as agents for the company. *Id.*..... 445
4. Assessments.—Where the policy expressly provides that the by-laws are made a part thereof and it is further stipulated in the policy that its acceptance constitutes one a member of the company and that by so accepting the policy insured agrees to pay, in addition to the annual premiums, such sums as may be assessed by the directors of the insurance company insured is liable for the amounts lawfully assessed. *Id.*..... 445
5. Assessments.—Ignorance of the fact that the company in which appellant placed its policies was an assessment company held not an excuse to defeat assessments where the appellant's president, a successful business man, had acted as agent for the company. It will be presumed he knew the company was operated on the assessment basis, the contention that it was misrepresented to him, he was insuring in an old line company, not finding support in the evidence. *Id.*..... 445

Life Insurance—

6. Assignment of Policy Payable to Wife.—Where a life insurance policy was made payable to the wife of the insured in case she survived h'm; otherwise to the insured, his executors, administrators or assigns, and the wife died before the insured, an assignment by him during her lifetime to his children "in case of my wife's prior death to mine" was valid although the wife did not consent to the assignment and although the insured did not upon notice consent thereto and although there was no actual delivery by the assignor of the assignment or policy to his children who were infants of tender years. *Thompson's Extrx. v. Thompson.* 3
7. Assignment of Policy.—A provision in a life insurance policy that "no assignment of this policy shall take effect until written notice shall have been given the company" is for the benefit and protection of the insurer and does not affect the validity of an assignment as between the assignor and assignee. *Id.* 3
8. Gift by Assignment.—A gift by assignment of a life insurance policy by a father to his infant children is not invalid because of the absence of an actual delivery to and acceptance by the children, where by his acts and conduct he constitutes himself their trustee in retaining possession of the policy. *Id.* 3
9. Misrepresentation in Application.—Under section 639, Kentucky Statutes, a material misrepresentation made in an application for a life insurance policy will prevent a recovery upon it, although the misrepresentation was innocently made, and in the belief of its truth. *Security Life Ins. Co. of America v. Black, Admr.* 23

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10. Misrepresentation in Application.—A misrepresentation is where one states as a fact, that which he knows is not a fact, with the intention to deceive; or states that as a fact, which he does not know to be true, and which has a tendency to mislead. *Id.* 23
11. Misrepresentation.—A material misrepresentation is as effective in defeating an insurance contract, as a breach of a warranty. *Id.* 23
12. Payment of Premiums—Failure to Deliver Policy.—Where a payment on the first premium on a life insurance policy accompanies the application for insurance and is to be applied to such premium in case the application is accepted and the policy issued, but to be returned in case the application is rejected, and the application is accepted and policy issued and forwarded by the company to its local agent for delivery to the insured and the collection of the balance of the premium, but the agent negligently fails to deliver the policy although requested so to do by the insured or his agent, the policy is nevertheless in full force, for the agent of the insurance company in such case is the agent of the insured and holds the policy for his use and benefit. *Commonwealth Life Insurance Co. v. McGuire.* 134

INTENT—See Contracts; Wills.

INTENTION—See Deeds.

INTOXICATING LIQUORS—

Evidence.—Evidence examined and held sufficient to authorize the verdict finding defendant guilty of furnishing and selling intoxicating liquors in violation of section 2557, Ky. Stats. *Mobley v. Commonwealth.* 424

JUDGMENT—See Appeal and Error; Infants—

1. Plea in Bar.—An attempted plea in bar which does not show such identity of the issues involved in the instant case and those involved in the former action, the judgment in which is relied on in bar, and which does not allege facts showing that the matter in issue was actually and necessarily litigated in the former action, is an insufficient plea in bar. *Birney v. Ballard County.* 241
2. Collateral Attack—Infants.—A judgment which is obtained upon process improperly served on infants but in which action they were represented, can be successfully attacked only in a direct proceeding and not collaterally. *McNeal v. Smith.* 355
3. Drains—Conclusiveness—Matters Concluded.—Where in the original proceeding it was finally adjudged that the establishment of a ditch was a benefit to plaintiff's land, the judgment

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- is *res judicata* as to that question in a subsequent attack on an assessment to maintain the ditch, unless it be made to appear that since its establishment the ditch has been so changed or altered by official action taken pursuant to legislative authority that the original benefits no longer exist. *Henderson Cotton Mills v. Trigg, Sheriff.* 411
4. After-Born Remaindermen.—A judgment in an action by an executor to sell land for the payment of debts, specific devises, and costs of administration, is not void as to an after-born remainderman where all the jurisdictional facts appear upon the face of the papers. *Wayne v. Brumley.* 488
 5. Collateral Attack.—Such judgment being only voidable, can not be made the subject of a collateral attack for fraud by such after-born remaindermen. *Id.* 488
 6. Collateral Attack.—An action, wherein it is alleged that the plaintiff is the owner of an undivided interest in a given tract of land, and the defendant answers relying upon a judgment of court as his source of title, and the plaintiff, for the first time, in his reply charges that the judgment in the action relied upon was obtained by fraud, is a collateral attack and can not be maintained. *Id.* 488
 7. Collateral Attack.—A direct attack on a judgment is an action, motion or proceeding for the specific and only purpose of setting aside or annulling the judgment of a court, and any action which has for its purpose any relief other than the setting aside of the judgment is a collateral attack. *Id.* 488
 8. Remaindermen.—The creditors of a decedent can not be indefinitely postponed in the collection of their debts because there may be in the future additional remaindermen under the terms of a will; and in such action the remaindermen in existence will be considered as representing all remaindermen of the same class who may thereafter come into existence, and such representative not then in esse is bound by the judgment. *Id.* 488
 9. Collateral Attack.—A judgment rendered by a court having jurisdiction of the subject matter and the parties in interest, is not void, though it may be erroneous, and can not be collaterally attacked, but, is subject only to a direct attack, either by appeal, or for vacation or modification as provided by sections 344, 414 and 518, of the Civil Code. *Johnson v. Carroll* 689
 10. Process.—The judgment of a domestic court of general jurisdiction will not upon a collateral attack be held to be void, unless the record of the action wherein it was rendered shows affirmatively the want of jurisdiction of the court. *Id.* 689
 11. Master's Report Not Final Order.—A report of a master commissioner charging the personal representative with a specified item or items, although followed by an order of confirmation, is not a final one for the purpose of appeal where there

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was no order of distribution of the fund or any adjudication of the rights of any one to any of it, and where those questions were left open for future determination, and especially so where a re-reference of the cause was made to the commissioner. *Farmers Bank & Trust Co., Admr. v. Stanley.* 762

JUDICIAL NOTICE—See Courts; Pleading.

JURISDICTION—See Appeal and Error; Courts; Criminal Law; Divorce.

JURY—

1. Member of Grand Jury Which Returned Indictment.—That a juror selected to try one charged with a felony was a member of the grand jury which returned the indictment does not render his discharge a matter of necessity. It only raises a question of implied bias which accused may challenge or waive. *Riley v. Commonwealth.* 204
2. Discharge of Juror—Waiver.—Where a jury is discharged from service with accused's concurrence, his consent thereto is an implied waiver of any objection to being tried anew. *Id.* 204
3. Discharge of Juror—Implication of Consent.—Consent to the discharge of a juror may appear as well by implication from the circumstances as by express words. *Id.*..... 204

JUVENILE DELINQUENTS—See Infants.

KNOWLEDGE—See Receiving Stolen Goods.

LANDLORD AND TENANT—

1. Rent.—Though there was no writing, as required by Ky. Stats., sec. 470, evidencing the assignment or transfer of a lease for a longer term than one year, where it is shown that the lease had been considered as cancelled, the assignees who had attorned to the owner, occupied the premises as tenants at will and were liable for the rent during the period of their occupancy. *Hoskins v. Black.* 98
2. Rent.—In a suit instituted by the landlord to collect rent, to which only the original lessees were made parties, it can not be said those who purchased from the lessee the personalty which was sold, were deprived of their property without due process of law, where they had notice of the suit, were present at the sale, and purchased the property, besides, at the time the suit was filed and the property sold said purchasers were occupying the premises as tenants of the plaintiff, and the rent sued for was for the period covered by their occupancy. *Id.* 98

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3. Termination of Lease.—A lease dated March, 1912, which provides that it shall be for a term of five years from and after the completion of a building to be erected on lessor's premises does not expire until five years from the date of completion. *C. N. O. & T. P. Ry. Co. v. Depot Lunch Room*..... 121
4. Termination of Lease.—Under Ky. Stats., sec. 2295, in a tenancy for a year or more, expiring on a certain day, if the tenant does not abandon the premises, or is not turned out of possession or does not make a new contract within ninety days after the expiration of the term, he remains thereafter as a tenant by sufferance from year to year and no legal proceedings to evict him are maintainable unless instituted within ninety days of any anniversary of the expiration date. *Id.* 121
5. Tenant by Sufferance.—Where a lease by its terms expires five years after the completion of the leased building, which was August, 1912, and no steps were taken to evict the tenant within ninety days from the same month in 1917, the tenant remained such by sufferance for another year and suit instituted August 2, 1918, was not premature. *Id.* 121
6. Acceptance of Rent After Expiration of Term.—Acceptance of rent after the expiration of the original lease where it is recited that it is received pursuant thereto does not act as a renewal or extension of the original lease, which was for five years, the acceptance of rent after the expiration of the contract term being entirely consistent with the rights of both parties under Ky. Stats., sec. 2295. *Id.* 121

LEASE—See Landlord and Tenant; Mines and Minerals.

LIBEL AND SLANDER—

1. Slander—Words Actionable Per Se—Words Charging Fornication.—To say of one that he is a whoremaster is not actionable per se since it amounts only to a charge of fornication, which is not an infamous crime, but only a misdemeanor punishable by fine. *Hickerson v. Masters.* 168
2. Slander—Words Actionable Per Se.—To say of one that he is a whoremaster is not actionable per se as a charge of the statutory offense of pandering. *Id.*..... 168
3. Slander—Words Actionable Per Se—Words Charging a Minister With Immorality.—A charge of immorality against a minister is actionable per se without a colloquium that the words were spoken of him in his professional capacity. *Id.*..... 168
4. How Words Construed—Innuendo.—Words in a slanderous charge are to be construed according to their ordinary meaning, but such meaning may not be enlarged by innuendo, so as to give to the words an application and scope which their ordinary sense does not import; but this does not prevent the plaintiff averring extrinsic facts connecting the slanderous

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- words with the facts as they existed, so as to show the intention of the defendant in speaking the words and the sense in which they were understood by those who heard them, provided it is not the purpose of such extrinsically alleged facts to attach a meaning to the words different from what they ordinarily import. *Gastineau v. McCoy*. Id. 463
5. How Words Construed.—In the construction of statutes the purpose of the legislature in enacting them should be looked to and considered and the literal meaning of the words will not be strictly adhered to when to do so would defeat the intent and purpose of the legislature. Id. 463
6. When Words Sufficiently Accuse.—When oral slanderous words aided by extrinsic facts are sufficient to impute the charge of removing a stump of a tree, which was a corner of a survey of land, they sufficiently accuse plaintiff of the offense denounced by section 1228 of the Kentucky Statutes and will support a cause of action for slander. Id. 463
7. Matters of Defense—Privilege.—A letter containing matter of a defamatory nature written by the president of a school to the parent of a pupil in the school informing the parent why the student had been dismissed from the institution and relating the facts and circumstances under which he was dismissed, is a privileged communication, and neither the school nor the president of the institution is liable to the pupil in damages for libel, if the letter was written in good faith with the proper motive and based upon reasonable or probable cause. *Baskett v. Crossfield and Transylvania University*..... 751
8. Privilege—Malice—Presumption.—A qualifiedly privileged communication is one where the circumstances are such as to preclude any presumption of malice, but if it affirmatively appear that the communicator was guilty of either falsehood or malice he is liable in damages. Id. 751

LICENSES—See Railroads; Vendor and Purchaser—

1. In Respect of Real Property.—A license as applied to lands is an authority to do a particular act or series of acts upon the land of another without possessing any estate therein. *Polley v. Ford*. 579
2. Respecting Real Property—Incurring Expenses—Revocation.—Where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement, by the construction of improvements thereon the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense; and this rule is particularly applicable to a telephone line con-

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structed by a licensee engaged in the business of serving the public possessing the right to acquire property for that purpose by condemnation, and where such a line has been constructed under an oral license, the licensor can not revoke the license and compel the removal of the line. *Lashley Telephone Co. v. Durbin.* 792

LIENS—See Appeal and Error; Bills and Notes; Corporations; Descent and Distribution.

LIFE ESTATES—See Wills—

1. Liens.—A life tenant, who is required to remove an encumbrance secured by a lien from the estate to prevent its sale, has a lien upon the entire property for recoupment. *Lindenberg v. Cornell.* 844
2. Repairs and Improvements.—It is the duty of the life tenant to make all ordinary, reasonable and necessary repairs upon the property of the estate, and can not charge the remaindermen, personally, nor their interests in the property, with any part of the cost. *Id.* 844

LOCATION—See Railroads.

LOGS AND LOGGING—

1. Sales and Conveyance of Standing Timber.—The provision in a deed conveying "saw log timber" on a described tract of land that the grantor gives to the grantee, over other lands of the grantor, "the full right of way to haul and cut all of said timber a good and sufficient road to haul on, corn and anything else, down said creek to the river," was a mere license to the grantee to use the passway while getting out the "saw log timber," which was the chief subject of the conveyance. *Polley v. Ford.* 579
2. Sales and Conveyance of Standing Timber.—The conveyance of the "saw log timber" on a described tract of land means such as is "saw log timber" at the date of the conveyance, and does not include any that may thereafter become "saw log timber" either by the growth of the timber or the changed conditions in the lumber market. *Id.* 579
3. Removal of Timber—Express Grant.—As no time was fixed for the removal of the timber, and it was contemplated that the same was to be promptly removed as the conduct of the parties showed, the law will imply an obligation to remove it in a reasonable time; and as the right to the passway only existed for the purpose of removal, that right also expired with the expiration of the reasonable time. *Id.* 579

MALICE—See Libel and Slander.

MANDAMUS—See Action—

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1. **Mandatory Injunction—Grounds—Persons Entitled to Relief.**
—An action for mandamus and mandatory injunction must be prosecuted by the proper public officer when the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, but if the general public as distinguished from the state in its sovereign capacity is affected, any citizen may sue out the writ or obtain the mandatory injunction. *City of Pineville v. Moore*..... 357
2. **Mandatory Injunction—Grounds—Persons Entitled to Relief.**
—A citizen, taxpayer and patron of the colored schools of a city, who sues on his own behalf and for the benefit of all other colored people who are bona fide residents of the city, may bring suit for the purpose of obtaining a mandatory injunction compelling the members of the board of council to perform their statutory duty with reference to the levy of taxes imposed by the board of education in cities of the fourth class. *Id.* 357
3. **Mandatory Injunction—Schools and School Districts—Cities of the Fourth Class—Petition—Sufficiency.**—A petition asking for a mandatory injunction against the members of the board of council, requiring them to levy taxes imposed by resolution of the board of education in a fourth class city was defective in that it never alleged that the general council had failed or refused to comply with the resolution. *Id.*..... 357

MASTER AND SERVANT—

1. **Governmental Control and Operation.**—An action can not be maintained against a telephone company by one injured through negligence of the employees of the government while the government was in control of the telephone company's system and lines. *McFeena's Admr. v. Paris Home Tel. & Tel. Co.* 299
2. **Action for Personal Injuries—Contributory Negligence.**—In an action by a girl 17 years old for damages for injury to her hands which were caught and burned between the rollers of a mangle in appellant's laundry, held that she was not guilty of contributory negligence in momentarily forgetting the dangerous character of her work, and thoughtlessly turning her eyes aside when something happened in the room to distract her, thereby allowing her hands to be drawn into a machine her employer had put her to operate, knowing the safety device with which it was equipped was not in working order, except for which the accident could not have happened. *Capital Laundry Co. v. McRoy's Guardian*..... 440
3. **Creation of Relationship.**—When an employer retains and exercises the right to direct the manner in which the business shall be done, as well as the result to be accomplished under

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- a contract, it creates the relationship of master and servant. Consolidation Coal Co. v. Gibbs. 717
4. Creation of Relationship.—Plaintiff's evidence analyzed, and when taken altogether is declared to have created the relationship of master and servant and not to have made him an independent contractor as claimed. *Id.*..... 717
5. Negligence—Printed Rule.—Where in an action by a servant against his master to recover damages for personal injuries alleged to have been caused by the latter's negligence, a ground of defense relied on was that the injuries of the servant were wholly caused by his own negligence in wilfully putting himself in a place of danger forbidden by a printed rule of the master with which he was familiar, and there was evidence supporting such defense, the refusal of the trial court to give an instruction offered by the master which properly told the jury the effect of such violation of the rule, was reversible error. *Elkhorn Coal Corporation v. Guttadora.*..... 770
6. Action to Recover for Time Lost.—To entitle one to recover for time lost while out of employment he must aver and prove that he made reasonable effort to find employment and to earn wages. *Randolph v. Castle.* 776

MASTERS IN CHANCERY—See Judgment.

MEASURE OF DAMAGES—See Eminent Domain; Waters and Water Courses.

MENTAL CAPACITY—See Deeds; Wills.

MEMORANDUM—See Auctions and Auctioneers.

MINES AND MINERALS—See Injunction—

1. Lease—Construction.—A coal operating lease, provided for the payment of a stipulated minimum royalty and in another clause of the contract it was agreed that if the lessee was prevented from mining sufficient coal to produce the minimum sum at the agreed rate because of certain enumerated causes and interruptions: Held that if the lessee in any month was prevented by any of the interruptions from producing enough coal to pay the minimum royalty that sum should be reduced as provided for in the contract, since the clause providing for such interruptions operates upon and modifies the provision for the payment of a minimum royalty as much so as any other part of the contract. *Siler v. White Star Coal Co.* 7
2. Lease Contracts.—An oil lease which provides that in the event operations are begun on a lease but are discontinued for sixty consecutive days the lease shall be null and void,

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- is null and void and unenforceable in so far as the lessee is concerned after abandonment for more than sixty days after drilling a well thereon. *Pratt v. Hays*. 20
3. Lease—Abandonment.—A lessee who drills a dry hole on an oil lease and then moves the machine away and works on another lease thereby abandons the first lease unless a clear intention to hold the lease otherwise appears. *Id.*..... 20
4. Surface Owner Can Not Interfere With Operation.—The surface owner of lands from which the minerals have been sold by deed granting all rights, privileges and easements on the surface which the grantee might deem necessary or convenient for mining and removing such minerals and reserving only such rights to the surface owner as were not inconsistent with the rights and privileges granted to the owner of the minerals, has no right to exclude or interfere with the owner of the mineral rights in the development of his property by limiting his improvements and buildings to a certain part of the surface outside the cleared and improved land of the surface owner. *McIntire v. Marian Coal Co.* 342
5. Lease—Contracts.—To complete a well as contemplated in a lease to drill for oil or gas within a fixed time means to drill a well within the time through the overlying strata and into the oil or gas bearing formations unless oil or gas in paying quantities is sooner encountered. *Hunt v. Garvin*. 472
6. Abandonment.—Where drilling on a well is abandoned before the shale which overlies the oil bearing sands is penetrated and without finding oil or gas in paying quantities the well is not completed as contemplated by the lease. *Id.* 472
7. Abandonment—Forfeiture.—Where the lease provided for forfeiture if a well was not completed or stipulated rentals paid within a fixed time, and the lessee began but did not complete a well or pay the rentals within the time, he abandoned and forfeited the lease and the court did not err in declaring same void in an action instituted thereafter for that purpose by the lessors. *Id.* 472
8. Completion of Wells—Manner of.—An oil lease which requires the lessee to complete a well or wells on the property within a given time or forfeit the lease is satisfied by the drilling of a hole in proper manner to the depth of the sand or formation in that district from which oil or gas is usually produced. *Kies v. Williams*. 596
9. Completion of Wells.—A completed well does not necessarily mean a producing well unless this intention is manifest from the lease contract. *Id.* 596
10. Contract for Oil or Gas Well—Construction.—Where an oil lease is in undeveloped territory and it is apparent from the lease contract that the parties to it contemplated the prospecting of the land to discover whether it contained oil or gas, any

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- expression requiring the drilling of a well or wells in order to avoid a forfeiture of a lease will be satisfied by the drilling of a hole or holes of oil well size to the depth of the sand from which oil is usually taken in that general district. *Id.* 596
11. Oil and Gas Lease—Failure to Use Diligence in Drilling—Cancellation—Finding of Chancellor—Sufficiency of Evidence.—In an action to cancel an oil and gas lease, providing that it should become null and void and all rights thereunder should cease unless the party of the second part commenced a well within one year and continued said operation with due diligence until one well was completed, evidence examined and held to sustain the finding of the chancellor that the lessees, after commencing the well, did not continue the operations with due diligence. *Wright v. Hunt.* 683
12. Grants and Reservations of Minerals.—When the language employed in a deed conveying land to one grantee and the mineral to another, indicates that the one is to take only the surface with improvements and timber and the other all the mineral, this will include the oil and gas. *Blakely v. Wilson.* 697
13. Enjoining Surface Owner.—The owner of the entire mineral estate may enjoin the surface owner from taking the oil and gas from the land. *Id.* 697

MINUTES—See Courts.

MISCONDUCT—See Criminal Law.

MISDEMEANOR—See Criminal Law, 21.

MISJOINDER—See Action.

MISREPRESENTATION—See Beneficial Associations; Fraud; Insurance.

MISTAKE—See Reformation of Instruments.

MITIGATION—See Assault and Battery.

MOB VIOLENCE—See Railroads, 4, 5.

MODIFICATION—See Contracts, 15.

MONUMENTS—See States.

MORTGAGES—See Husband and Wife—

Failure to Execute Note.—A provision in a mortgage to secure the payment of a stated indebtedness which provides that the sum is to be paid four months from date, imports a promise to pay and though the parties failed to execute a

MORTGAGES--Continued—

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note as provided, the mortgagee is entitled to a personal judgment against the mortgagor in a suit for the consideration.

Hoskins v. Black. 98

MOTOR VEHICLES—See Appeal and Error; Highways; Street Railroads.

MUNICIPAL CORPORATIONS—See Gas—

1. Quorum or Number Required to be Present to Act.—A quorum of a representative body, with a definite membership, sufficient to authorize the transaction of business, in the absence of statutory provisions to the contrary, must consist of a majority of the membership of the body, which should include all of the members provided for whether they be filled or not; but it is competent for the legislature or that department of the state creating the board or body, to provide what shall constitute such a quorum or to authorize the body itself to determine what shall constitute a quorum. *Seller, Safety Commissioner of the City of Covington v. O'Maley.* 190
2. Quorum or Number Required to be Present to Act.—Election of Health Officer.—The statute (section 2054a-21, vol. 3, Kentucky Statutes) providing for a board of health in cities in this Commonwealth having more than ten thousand population, prescribes that the board shall consist of six members appointed by the council of the city, and that the mayor of the city shall be an ex-officio member thereof, and that the board as so constituted should elect a health officer for the city. Held, that the mayor as an ex-officio member of the board has all the power and authority of any other member and should be estimated in counting a quorum; and further, that for the purpose of electing a health officer for the city the board had a membership of seven (the health officer to be elected not to be estimated in counting a quorum although after his election he became an ex-officio member of the board) and that at a meeting where four members of the board, including the mayor, were present and elected a health officer his election was valid, since the four members present including the mayor constituted a quorum of the board for that purpose. *Id.* 190
3. Indebtedness—Constitutional Restrictions.—A city of the third class, with a population of less than fifteen thousand persons, is not authorized to incur an indebtedness in excess of five per centum of the assessed value of its taxable property, unless at the time of the adoption of the Constitution, it then had an indebtedness in excess of five per centum of its taxable property, in which event, it may incur an additional indebtedness not in excess of two per centum of the value of its taxable property, to be estimated by the assessment im-

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- mediately preceding the last assessment before the incurring of the indebtedness. *Bosworth v. City of Middlesboro*. 246
4. Indebtedness—Constitutional Restrictions.—If at the time of the adoption of the Constitution a city of the third class, having a population of less than fifteen thousand persons, has an indebtedness in excess of five per centum of the value of its taxable property, and such indebtedness is thereafter reduced to a sum less than five per centum of the value of its taxable property, it can not thereafter incur indebtedness, including that existing, in excess of five per centum of the taxable property. *Id.* 246
 5. Issual of Bonds—Pleading.—An ordinance by the commissioners of a city of the third class, providing for the issual of bonds of the city, and the levy of a tax to pay the interest thereon, and to liquidate the principal when due, is presumed to be a valid exercise of its powers within the constitutional limitations, and one, who attacks the ordinance upon the grounds of unconstitutionality, must set out in his pleading, the facts, which demonstrate the invalidity or else fail in his action. *Id.* 246
 6. Street Improvements—Liability of Lot Owners.—There is no common law liability upon lot owners to pay for street improvements; the liability is purely statutory and to create a valid lien the statute must be followed. *Robertson v. Southern Bitulithic Co.* 314
 7. Street Improvements.—Where an ordinance for the improvement of a street provided that the work should be completed within six months after the passage of the ordinance, time not being of the essence of the contract as between the city and the property owners, the latter are not exempt from the payment of an apportionment for their part of the improvement where the city later extended the time for the completion of the work. *Id.* 314
 8. Ordinances—Resolutions.—Under Ky. Stats., sec. 3235c, authorizing cities of the second class to be organized under the commission form of government, the distinction between the formalities attending the passage of an ordinance and a resolution is removed and they are placed upon the same basis of deliberation and efficacy. *Id.* 314
 9. Street Improvements.—Ky. Stats., sec. 3235c, authorizes the construction or reconstruction of streets by either an ordinance or a resolution. *Id.* 314
 10. Ordinances.—The extension of time for the completion of public work authorized by an ordinance may be granted by a resolution where, under the commission form of government, both an ordinance and a resolution are passed in the same manner. *Id.* 314

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11. Street Construction.—Property owners will not be exempt from the payment of their part of the cost of construction of a street on the ground that the work was not completed within the time specified in the ordinance, where an extension was granted in a resolution passed after the period specified, the contractor having completed the work as per his contract, since under Ky. Stats., sec. 3100, it is provided that no error in the proceedings of the general council shall so exempt the property and which authorizes the courts to make all corrections that may be necessary to do justice to all parties. *Id.* 314
12. Sewers—Damages.—The legal obligation of a municipal corporation to construct sewers is one to be voluntarily assumed, and if it does not undertake to create a system of sewers it is not responsible for damages caused by freshets. But when the municipality assumes the obligation of constructing a sewer it must keep the same in good order and repair, and is liable in damages for injuries caused by its failure so to do. *Price Brothers v. City of Dawson Springs; Price v. City of Dawson Springs.* 349
13. Sewers—Overflows.—If the municipality owns or controls a sewer its duty goes no farther than to see that it is so constructed and maintained as to carry off sewage emptied into it and prevent such overflows of the premises of property holders of the city as may be caused by ordinary rainfalls, i. e., such heavy rainfalls as might reasonably be expected in the locality. The city will not be responsible for overflows from extraordinary rainfalls, such as are not reasonably to be expected. *Id.* 349
14. Sewers—Damages.—Where in an action brought against a city by a property owner to recover damages for an overflow of his lot and building from a sewer, caused, as alleged, by the defectiveness of the sewer, and the answer of the city denies its ownership and control of the sewer; also that it was defective and controverts the plaintiff's right to damages, the issues thus made are to be determined by the jury under proper instructions of the trial court, from all the evidence introduced by the parties; and where, as in this case, the evidence is conflicting and the instructions correctly give the law, a verdict for the city will not be disturbed unless found to be flagrantly against the evidence, which does not appear. *Id.*..... 349
15. Creation, Alteration and Dissolution.—The power to create, enlarge or dissolve a municipal corporation belongs exclusively to the legislative department of the government and can not be exercised by the judiciary, nor can the legislative delegate such a function to the judiciary. *Boone County v. Town of Verona.* 430

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16. Dissolution of Municipal Corporations.—The General Assembly may enact a general law for the dissolution of municipal corporations of the sixth class and provide that it take effect upon a town of the class, when a number of its inhabitants shall accept its application, without unconstitutionally delegating the power to legislate. *Id.* 430
17. Taxation.—The power of a city to expend or contract to pay public funds is limited to the power to tax. *Barrow v. Bradley, Mayor.* 480
18. Taxation.—While as a general proposition the legislative branch of a state can not delegate sovereign powers, the power to create local governmental agencies comes with the power to confer upon such municipalities the power to tax for municipal purposes. *Id.* 480
19. Local Self Government—Delegation of Power.—Section 156 of Kentucky Constitution confers upon the General Assembly of the Commonwealth authority to delegate to cities and towns all powers needful for local self government. *Id.* 480
20. Bonds.—Cities of the Commonwealth have no inherent power to issue bonds (sec. 162 of the Const.), and same are void unless the express authority of law therefor can be found in the charter. *Id.* 480
21. Bonds for Erection of Memorial Buildings.—Charters of cities of the second class do not contain express or implied authority for such cities to issue bonds for the erection of a memorial building for those citizens of the city and state who lost their lives in defense of the nation. *Id.* 480
22. Powers—General Welfare Clause.—The powers conferred upon municipalities must be construed with reference to the object of their creation as agencies of the state in local government, and a general welfare clause added to a grant of enumerated powers in a city charter confers no other powers than such as are within the ordinary scope of municipal authority or which are necessary to accomplish municipal purposes. *Id.* 480
23. Powers.—Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. *Id.* 480
24. Powers.—The exercise of a power by a municipality to be valid must be reasonable. *Id.* 480
25. Elections—Notice.—That part of section 29, chapter 112, Acts 1920, which requires the sheriff or other officer having charge of the election "to have the order published in some weekly or daily newspaper published or circulated in said county for at least two weeks before election, and also to advertise the same by printed or written handbills posted in conspicuous places in said city for the same length of time" is mandatory and not merely directory and must be substantially com-

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- plied with or the election will be void. *Seiler v. Dillon*, County Clerk. 779
26. Elections—Notice.—The special election must be advertised both by newspaper and by handbills for the time specified in the act to sustain the election. *Id.*..... 779

NEGLIGENCE—See Highways; Master and Servant; Railroads—

1. Evidence.—Where the plaintiff relies upon the negligence of the defendant for recovery every fact necessary to show negligence must be proved or admitted—it can not be presumed. *Cummings' Admr. v. Paducah Grain and Elevator Co.*..... 70
2. Actionable Negligence—Trespasser or Licensee.—Where a trespasser on license was killed by a descending elevator car while attempting to pass through an elevator shaft, and it is shown by the evidence that when the elevator was in about one foot of his head he gave an alarm, but there was no evidence to show how fast the elevator was going at the time, nor whether it could have been stopped by the operator by the exercise of the means at hand in time to have averted the danger no actionable negligence was shown. *Id.*..... 70
3. Fires.—A vendor who has sold and conveyed his property to another, and who remains in possession under an agreement, is liable if he negligently causes a fire which destroys improvements thereon. *Wilcoxson v. Caldwell.* 278
4. Fires—Actions Between Individuals.—The liberal rules of evidence permitted by the courts in actions against railroad companies for damages caused from fires resulting from the escape of hot cinders, will not be applied in actions between individuals for the negligent causing of a fire in a dwelling house. *Id.* 278
5. Fires—Vendor Remaining in Possession.—A vendor so remaining in possession of a house by agreement and using the same only in such manner as is customary, and in such way and for such purposes as it is generally used, is not guilty of negligence and consequently not liable. *Id.*..... 278
6. Fires—Burning of Refuse.—The burning in an open grate, in small quantities, of paste board boxes or other refuse customarily destroyed in that way by housewives, is not negligence. *Id.* 278

NEW TRIAL—See Appeal and Error; Criminal Law; Rape—

1. Time for Application.—A motion for a new trial must be made at the term in which the verdict or decision is rendered and within three days thereafter unless unavoidably prevented, and this means three days after the entry of record of the verdict of the jury, or the decision of the court when the jury is waived and the law and facts submitted to the court; and

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- does not mean three days after the rendition of the judgment upon the findings of fact either by a jury or by the court. *Sovereign Camp Woodmen of the World v. Hornung*..... 381
2. In order to enable this court to review errors occurring at or during the trial, held by the court without the intervention of a jury, a motion for a new trial is necessary. *Id.*..... 381
3. Time for Application.—The requirement of section 342 of the Code as to the time within which the motion for a new trial should be made is mandatory, and unless made within the required time the only question before this court on appeal is whether the pleadings sustain the judgment. *Id.* 381
4. Newly Discovered Evidence.—A new trial will not ordinarily be granted for newly discovered evidence, the only purpose of which is to contradict a witness who testified in the case; nor will a new trial be granted on that ground unless the party moving therefor exercise due and proper diligence to discover and produce the testimony at the trial. *L. & I. R. Co. v. Roberts; Same v. Same.* 744
5. Carriers—Knowledge of Agent.—An agent of a common carrier whose duty it was to investigate the facts relating to an accident is a representative of the carrier and his knowledge concerning a statement made by a witness who testified upon the trial contrary thereto is the knowledge of the carrier, and a new trial will not be granted on the ground that defendant's attorneys discovered the existence of the contradictory statement after the trial, since the carrier is presumed to have had knowledge of it and should have produced it on the trial. *Id.* 744

NEWLY DISCOVERED EVIDENCE—See Criminal Law; New Trial.

NOTES—See Mortgages.

NOTICE—See Highways; Municipal Corporations.

NUISANCE—See Highways—

1. Storing and Piping Oil.—The storage in tanks of crude petroleum and the piping of same into tank cars for shipment by rail is not per se a nuisance, but the manner in which the business is conducted, its proximity to other buildings and the circumstances surrounding it, may be such as to render the same a nuisance. *Great Northern Refining Co. v. Lutes*..... 451
2. Noisome Odors.—A nuisance may be created where the air is so corrupted by noisome smells as to substantially interfere with the use and occupancy of one's premises for residential purposes. *Id.* 451
3. Conduct of Business—Question for Jury.—Whether the conduct of a business is such as to create a nuisance is usually

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- under the facts of the case one for the jury and not the court, the question being one not of negligence or no negligence but nuisance or no nuisance. *Id.* 451
4. Evidence—Introduction of Deed.—Where an issue was raised by the pleadings as to who was the owner of or operating a business alleged to create a nuisance it was error to overrule a motion to introduce in evidence a deed executed before the creation of the condition complained of whereby defendant conveyed the property involved to another who thereafter operated the plant. *Id.* 451
5. Anticipatory Loss by Fire.—The mere anticipatory loss by fire because of the possibility that an oil tank might be struck by lightning or fired by a spark from a locomotive does not form the basis upon which a legal recovery might be predicated under the facts presented in the instant record. *Id.*..... 451

OBSTRUCTION—See Railroads.

ODORS—See Nuisance.

OFFICERS—See Injunction—

1. County Road Engineer—Term.—The amendment of 1918 to the act of 1914 creating the office of county road engineer did not definitely fix the time at which the term of office of county road engineer should expire as the first of January, but expressly provides that such engineer shall serve a period of two years from and after the first day of January, and until his successor is appointed and qualified. *Birney v. Ballard County* 241
2. Holding Over—De Jure Officer—Salary.—Where one is holding an office for a specified term and until his successor is elected and qualified, if at the expiration of the specified term no one capable of holding the office has been elected and qualified, the incumbent may hold over, and the hold over period is as much a part of his term of office as was that before the expiration of the specified term, and during such period he is a de jure officer and as such may maintain an action for his salary. *Id.*..... 241
3. Term of Police Judge.—That portion of sub-section 5 of section 3480b, Kentucky Statutes, 1915 edition, which limits the term of police judge to two years when elected in the odd year after the adoption by cities of the third class of the commission form of government, violates the provisions of sections 160 and 167 of the Constitution and is therefore void. Those sections fix the term of police judges at four years, and it is incompetent for the legislature to change the term either by shortening or lengthening it. *Watkins v. Pinkston*..... 455

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4. Public Officers—Removal for Cause—When Court Will Interfere.—Where an officer has been appointed for a fixed term, subject to removal for cause, the sufficiency of the cause is a question of law for the courts, and where the cause alleged is legally insufficient the courts will take the necessary steps to prevent the removal of such officer or to set aside the removal and restore him to office. *Stanley v. Fiscal Court of Hopkins County*. 495
5. Public Officers—County Treasurer—Violation of Statutory Duty As Ground for Removal.—Where the legislature imposes on an officer a particular duty, and makes that duty so important as to provide a penalty for its non-performance, the courts do not feel at liberty to say that a failure to perform such duty is such a slight delinquency on the part of the officer as not to amount to a sufficient cause for his removal. *Id.* 495

OILS—See Mines and Minerals; Nuisance.

OMITTED PROPERTY—See Taxation.

OPINIONS—See Injunction.

ORDERS—See Courts.

ORDINANCES—See Municipal Corporations.

OVERRULED CASES—

Stanford College v. Board of Education, 145 Ky. 388, is overruled. *Trustees Baptist Female College v. Barren County Board of Education* 565

PARDON—

Authority to Pardon, Reprieves, Remit Fines and Forfeitures.—The provision for the payment of prisoners a small per diem for their labors is not an encroachment upon the powers conferred upon the Governor by section 77 of the Constitution to remit fines and forfeitures, commute sentences, grant reprieves and pardons. *State Board of Charities and Corrections v. Hays; Same v. Combs* 147

PAROL EVIDENCE—See Evidence; Trusts.

PARTIES—

Bringing in New Parties.—Where in an action, with the parties, who are before the court, a complete determination of the question involved can not be had without necessary parties being brought before the court, the court should require them to be made parties, or else dismiss the action without prejudice to another action. *Farley v. Alderson*..... 632

PASSWAYS—See Easements.

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PER CAPITA DISTRIBUTION—See Wills.

PERSONAL INJURIES—See Damages; Master and Servant;
Railroads; Street Railroads.

PLEA IN BAR—See Judgment.

PLEADING—See Appeal and Error; Criminal Law 5; Estoppel;
Infants; Mandamus—

1. Exhibits.—Where an exhibit, which is the basis of the action, is filed with the petition, the exhibit will control; and where there is a variance between the exhibit and the pleading the exhibit will prevail. *Blythe v. Warner*..... 104
2. Judicial Notice.—Facts of which the court is required to take judicial notice need not be stated in the petition, and a general demurrer will be sustained to a pleading if when the facts of which the court will take judicial notice are read into the petition, it presents no cause of action. *McFeena's Admr. v. Paris Home Tel. & Tel. Co.*..... 299
3. Inconsistent Pleas—Waiver.—Inconsistent pleas or statements must be taken advantage of by motion to elect (sec. 113, subsec. 4, Civil Code) and the adverse party waives objection thereto by responding to both pleas or statements without motion to elect. (Secs. 85 and 86, Civil Code.) *Hunt v. Garvin* 472
4. Conclusion of Pleader.—The averment of mere conclusions of law without the facts from which they are deduced in a pleading is bad. *Giltner v. McCombs Producing and Refining Co.*..... 601
5. Action for Value of Services—Sufficiency.—A petition which states with reasonable certainty the time of the making of the contract, the promise to pay a definite amount for services, the performance of the services in accordance with the agreement, the finding of a purchaser as required by the agreement and the purchaser's ability and willingness to buy and pay for the property at the price and on the terms fixed by the principal, the refusal of the principal to carry out the contract, although the purchaser is ready to take the property and pay for same, and demand of the agent for his commission and refusal of the principal to pay, states a cause of action. *Id.*..... 601

POLICE COURTS—See Officers.

POLICY—See Insurance.

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POWERS—See Municipal Corporations, 22, 24.

PREFERENCES—See Fraudulent Conveyances.

PREMIUMS—See Insurance.

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PRESCRIPTIVE USE—See Easements.

PRESUMPTIONS—See Appeal and Error; Libel and Slander.

PRINCIPAL AND AGENT—

Commissions.—One who enters into a contract for the sale of property, either real or personal, for another for compensation, and in pursuance to the contract finds a purchaser who is able, willing and ready to buy the property at the price and on the terms fixed by the principal, but the sale is not consummated because the principal refuses to carry out the contract, is entitled to his commission in the same way as if the sale had been completed. *Giltner v. McCombs Producing and Refining Co.* 601

PRINCIPAL AND SURETY—

1. Nature and Extent of Liability of Surety.—The surety is not bound if the obligee violates the terms of the suretyship, *Inland Navigation Co. v. American Surety Co. of New York*..... 504
2. Contract of Surety Company.—While a contract of a surety company for pay is not construed as strictly in favor of the surety as a voluntary contract of like nature, nevertheless the surety will not be bound if the obligee in the bond breach its material terms. *Id.* 504
3. Discharge of Surety.—Where the contract of suretyship required the obligee in the bond to retain a certain per centum of the contract price of a boat to be built until the vessel was inspected and accepted after notice to the surety, the obligee violated this part of the agreement and paid the full contract price to the builder, the surety is relieved of liability on the bond. *Id.* 504

PRISONERS—See Statutes; States.

PRIVILEGE—See Libel and Slander.

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PROFITS—See Damages.

PROOF—See Contracts, 13, 14.

PROVOCATION—See Assault and Battery.

PUBLIC MONEY—See States.

PUBLIC USE—See Eminent Domain.

QUANTUM MERUIT—See Brokers.

QUESTION FOR JURY—See Appeal and Error; Criminal Law;
Nuisance; Street Railroads. Page

QUORUM—See Municipal Corporations.

RAILROADS—See Appeal and Error, 7; Carriers—

1. Water Closets—Locks.—It is just as necessary for a railroad company to furnish its patrons with the means of entering a water closet as it is to furnish the water closet itself; and though it may keep the closet locked it should see that the keys are accessible. To that end it may leave the keys with the agent when there, but when he is not there, the keys should be left in an exposed place where they may be readily seen and obtained by patrons having occasion to use the closet. *Commonwealth v. Louisville & Interurban R. Co.*..... 39
2. Water Closets—Criminal Prosecution—Extent of Proof—Question for Jury.—To authorize the submission of the case to the jury, it is necessary in a criminal prosecution under section 772, Kentucky Statutes, to show to the exclusion of a reasonable doubt that a water closet otherwise suitable and convenient was kept locked and that the keys thereto were not accessible to the patrons. *Id.* 39
3. Water Closets—Criminal Prosecution—Question for Jury—Sufficiency of Evidence That Keys to Water Closet Were Not Accessible.—In prosecution under 772, Kentucky Statutes, evidence that the keys were inaccessible to patrons held insufficient to take case to the jury. *Id.*..... 39
4. Duty to Protect Freight Consigned—Negligence—Loss of Property By Mob.—A railroad company's employees in charge of its yards are charged with the duty of protecting freight consigned therein. In such case the railroad company is an insurer and it can not relieve itself from liability merely by pleading and showing that a mob was in progress unless it further shows that the destruction of property did not result through its negligence. *Southern Ry. Co. in Ky. v. John T. Barbee & Co.* 63
5. Loss of Property in Transit Through Mob.—A railroad company may contract against liability for loss of goods in transit through a mob but it can not contract against its own negligence, and it can not relieve itself by showing that the fire was started by a mob, if it appears that by ordinary care it could have saved the property between the starting of the fire and its destruction. *Id.* 63
6. Railroad Commission—Powers of.—The railroad commission being a creation of the statute can exercise no powers except those conferred by the statute. *Louisville & Nashville Railroad Co. v. Commonwealth.*..... 73
7. Stations—Powers of Court in Respect to.—A court has no independent jurisdiction to order a railroad company to build or repair a station, as the legislature has conferred on the

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- railroad commission powers in respect to stations, and when power in relation to specific matters has been given to an administrative body this body must take appropriate action concerning the matter delegated to it before the courts have jurisdiction to act. *Id.* 78
8. Power of Court in Respect to Stations and Other Matters Concerning Railroads.—A court may have independent jurisdiction to compel a railroad company to do the things needed to enable it to perform the purposes for which it was created when the authority to require it to do these things has not been conferred by the legislature on some administrative body. *Id.* 78
9. Power of Railroad Commission in Respect to Stations.—Section 772 of the Kentucky Statutes gives the railroad commission power to order stations “burned or otherwise destroyed” or that “become unfit for the accommodation of the public” to be rebuilt or repaired as the case may be. *Id.* 78
10. Power of Railroad Commission in Respect to Stations.—The railroad commission has no power to order a new station to take the place of an existing one. It can only order it so repaired as to make it fit for the public accommodation. But when a station has been “burned or otherwise destroyed” it may order a new station built. *Id.* 78
11. Stations—“Burned or Otherwise Destroyed”—Definition of.—A station is “burned or otherwise destroyed” when from fire or other cause it has become totally unfit for use. *Id.* 78
12. Penalties for Failing to Comply with Orders of Commission.—If a railroad company fails to comply with proper orders of the railroad commission in respect to stations it may be punished under section 793 of the Kentucky Statutes. *Id.* 78
13. Railroad Commission—Powers Under Section 830 of Statute.—Section 830 of the Kentucky Statutes gives the railroad commission no power to enforce any orders or directions it may make under this section. It can only lay the facts before the attorney general and report to the legislature what it has done. *Id.* 78
14. Injuries to Persons on or Near Tracks—Negligence—Contributory Negligence—Question for Jury.—In an action against a railroad for injury to a child at a place where the company owed the duty to maintain a lookout and to give reasonable warning of the train’s approach, evidence examined and questions of negligence and contributory negligence held for the jury *Chesapeake & Ohio Ry. Co v. Honaker*..... 125
15. Injuries to Persons on or Near Tracks—Trial—Instructions.—In an instruction telling the jury that if they believed from the evidence that the plaintiff, after receiving or having warning or notice of the train’s approach, ran upon the track or so

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- close to it that the injury to him could not have been averted by those in charge of the engine, if reasonably sufficient lookout had been observed, they should find for the defendants, the use of the words, "if reasonably sufficient lookout had been observed," was proper where there was evidence tending to show that plaintiff went upon the track so far ahead of the train that a proper lookout would have enabled defendant to have warned him of the danger, or to have stopped the train in time to have prevented the accident. *Id.*..... 125
16. Collisions—Negligence—Last Clear Chance.—Where the accident occurs at a place where the defendant is under the duty to maintain a lookout, plaintiff's contributory negligence in going upon the track with knowledge of the approach of the train will not defeat a recovery if the defendant by the exercise of ordinary care, could have discovered his peril in time to have prevented the injury. *Id.* 125
17. Injuries to Persons on or Near Tracks—Trial—Instructions.—An instruction telling the jury that, although they believed from the evidence that the defendant was guilty of negligence in the operation of the train and in the injury to plaintiff, yet, if they should further believe from the evidence that plaintiff, when at a safe distance from the track, knew of the approach of the train and with this knowledge went upon the track and was injured, he assumed the risk of the injury was properly refused because it relieved defendant of all liability even though it might have discovered plaintiff's peril in time to have avoided the injury by the exercise of ordinary care. *Id.* 125
18. Change of Location—Obstruction of Streets.—One who acquires real property in a city at a time when a preliminary survey of a railroad company is located a block or more away, may recover damages of the railroad company if it changes its location so as to obstruct the street in front of property acquired and cut off the means of egress and ingress, or the railroad company in the operation of its trains casts cinders and smoke upon the premises and otherwise interferes with the enjoyment of the premises. *Weitlauf and Wife v. Paducah & Illinois R. R. Co.* 143
19. Obstruction of Streets.—Where the facts are controverted it is for the jury to determine whether the plaintiff has made out his cause by showing that the streets have been obstructed, or that the railroad in its operation has cast cinders and smoke upon the house. *Id.*..... 143
20. Actions for Injuries to Licensees.—A railroad is not liable to a licensee injured by stepping into a hole on the company's right of way while attempting to go around a train blocking a public crossing. Such person must take the license to

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- so use the company's tracks with its accompanying perils.
Rabe v. Chesapeake & Ohio R. R. Co...... 255
21. Actions for Injuries to Licensees.—A licensee must take the company's property as he finds it, since the owner is only reponsible to him for injuries resulting from wilful acts. *Id.* 255
22. Action for Recovery of Value of Sample Cases and Samples.— In an action by a traveling salesman to recover of a railroad company damages for the loss, through its negligence, of his sample cases and samples, the recovery may include the reasonable value of the property lost, and, if working on a salary, such loss thereof, if any, as he may have sustained by being deprived of the sample cases and samples and while unable by reasonable effort and care to replace them. But he will not be entitled to recover, by way of damages, for any loss of commissions on sales of merchandize he might have made during the time he was deprived of the sample cases and samples, as such damages are purely conjectural and speculative. *Hines, Director General of Railroads v. Denny*..... 416
23. Crossings—Licensees—Personal Injuries.—One who sits or prostrates himself upon a railroad track, though it be at a public crossing or other place where persons are licensed to use the track, is in no better position than a mere trespasser; and in such case the servants of the railroad company in charge of and operating a train are only required to use ordinary care, after discovering his peril, to protect him from injury. *Bevin's Admr. v. C. & O. Railway Co. and Schump.*..... 501
24. Personal Injuries—Res Gestae.—The testimony of an attending physician regarding an alleged statement by a person injured by a train, explanatory of the manner of receiving his injuries, made more than an hour after they were received and shortly before his death, was not admissible as a part of the res gestae or otherwise competent. *Id.*..... 501
25. Action for Death—Evidence—Instructions.—Where in an action by the administrator of a decedent against a railroad company to recover damages for his death, the evidence was wholly to the effect and uncontradicted that when run over by the tender of one of its engines he was lying on the railroad track shortly after 1 o'clock of an unusually dark night; that the engine in charge of the engineer was slowly backing the tender at a speed of between two and four miles an hour, the engine bell constantly ringing, the fireman with a lantern in his hand sitting on the end of the backing tender and keeping a constant look out ahead of it; and that the decedent on the track was not discovered by him until the tender reached him and too late to prevent it from running over him: Held, that such evidence authorized the peremptory instruction that was given by the trial court, directing a verdict for the defendant. *Id.*..... 501

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26. Crossings—Care to be Exercised at Crossings.—A railroad crossing a public and much frequented highway is obliged to exercise ordinary care to avoid injury to persons on such highway, and if the tracks of the railroad lay in a deep cut and are so obstructed that the motorman or engineer can not see the highway on either side of the track, nor the traveler on the highway see the approach of the train on the track until within a few feet thereof, the sounding of the usual signal for highway crossing by bell or whistle on the train is not sufficient, but the trainmen must employ such other means as will reasonably safeguard persons on the highway crossing from danger by collision with trains. *Veach's Admr. v. Louisville & Interurban R. Co.*..... 678

RAPE—

1. Carnal Knowledge of Female Under 16 Years of Age.—Carnal knowledge of a female under 16 years of age is prohibited by section 1155, Ky. Stats., and one who admits having had such relations with a female whose age is shown not to have exceeded 16 years at the time, is guilty of the crime condemned by the statute aforesaid. *Lewis v. Commonwealth*.... 160
2. Extent of Proof of Which Defendant Should Be Apprised—New Trial.—Other than the information conveyed through the charge set out in the indictment, the Commonwealth is not compelled to apprise defendant of the nature of the proof it intends to introduce and defendant is not entitled to a new trial on the ground of surprise when, assuming the prosecuting witness would claim she was not 16 years old on a given date, he prepares his case accordingly, but upon the trial said witness admitted she was over 16 years old on said date. The only question for the jury was whether the girl was over 16 years of age at the time the crime was committed. *Id.*..... 160
3. Time of Commission of Offense—Evidence.—In the trial of an indictment under section 1155, Kentucky Statutes, the Commonwealth may prove the offense was committed any time prior to the finding of the indictment. *Riley v. Commonwealth*. 204
4. Detaining Woman Against Her Will—Not Degree of Incest.—The offense of detaining a woman against her will is not a degree of the offense of incest. *Breeding v. Commonwealth*.... 207

RECEIVERS—

- Title to the Possession of Property—Waste.—In an action, wherein the title to land is involved, a receiver should not be appointed for the land, when it is not shown, that the party applying for the receiver, is not in the enjoyment of all the land, and all the rights which he claims in it; and if a party to the action is shown to be in possession and

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claiming the ownership of it, a receiver should not be appointed, unless, it appears, that the party in possession is insolvent and committing waste thereon; and if the land is jointly owned, a receiver should not be appointed unless the one in possession is committing waste, or excluding the other joint owners, or at least doing something in derogation of the rights of the others interested and there is no other available remedy to protect the rights of all. *Saylor v. Hilton*. 200

RECEIVING STOLEN GOODS—See Criminal Law—

1. Goods—Indictment and Information—Variance.—In an indictment for receiving stolen goods it is only necessary that the owner of the goods be named and a variance is immaterial where the indictment specifically describes the property stolen which it charges the defendant with receiving. *Shuttles v. Commonwealth*. 176
2. Goods—Indictment and Information—Sufficiency.—In an indictment for receiving stolen goods it is not necessary to allege that it was the purpose of defendant to permanently deprive the owner of the use thereof, where it is averred that the receiving of the goods was done unlawfully, wilfully and feloniously. *Id.* 176
3. Elements of Crime.—To constitute the crime of knowingly receiving stolen property, the property must theretofore have been the subject of a larceny by one other than the receiver of the goods; the reception must have been with the knowledge of the recipient, that the property had been stolen; and the reception must have been with the intention to deprive the owner of it. *Banks v. Commonwealth*. 330
4. Place Where Crime Committed.—The crime of knowingly receiving stolen property under the statute is a crime complete in itself and the place of its commission is not controlled by the place of the larceny, but, is committed where the stolen property is received, with knowledge of its character. *Id.* 330
5. Elements of Offense—Evidence.—To sustain a conviction for the crime of knowingly receiving stolen property a guilty knowledge must be shown on the part of the recipient, but, it is not necessary to prove an absolute knowledge from express information received or personal observation of the larceny, but, if such facts are shown, as from which a reasonable man of ordinary observation would morally know, that the goods had been stolen, this will constitute such evidence as from which the jury may infer, that the recipient had full knowledge of the character of the property, but mere suspicion or belief, in the absence of such circumstances as above described will not sustain a conviction. *Id.* 330

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6. Knowledge of Fact.—The rule in equity, which provides that one shall be deemed to have knowledge of a fact, when such circumstances are brought to his attention, as would cause a man of ordinary prudence to be upon his guard, and when diligently pursued would result in a knowledge of the fact, does not apply to knowledge of the stolen character of goods, as such rule would make one liable to criminal punishment for want of ordinary prudence or negligence. *Id.*..... 330
7. Evidence.—Guilty knowledge in the reception of stolen goods, as well as the fact of receiving such goods, can be proven by evidence of circumstances, as any other facts may be proved. *Id.* 330

RECORDS—See Appeal and Error.

RECOVERY—See Counties.

REFORMATION OF INSTRUMENTS—

1. Deeds—Bona Fide Purchasers.—A deed will not be reformed on the ground of mistake in the quantity of land conveyed as against a subsequent purchaser for value without notice. *Johnson v. Beaver Creek Fuel Co.* 499
2. Deeds—Mistake—Bona Fide Purchasers.—A deed will not be reformed on the ground of mistake as against a subsequent purchaser for value without notice. *White Grocery Co. v. Moore; Moore v. Snyder.* 671

REFORMATORIES—See Criminal Law—

1. Juvenile Delinquents.—The inmates of the house of reform, whose maintenance to the extent of \$100.00 per year the counties are required to provide, are the children over ten years of age and under sixteen years of age, and who have not been transferred to other proper courts, by the county courts, to be proceeded against under the general criminal laws of the state, but, who are convicted of being delinquents, by the county courts, and sentenced to confinement in the house of reform. *Lang, Judge v. Commonwealth.* 29
2. Maintenance of Houses of Reform by Counties.—Under section 252 of the Constitution, the legislature is within its authority to require each of the counties of the state to maintain the inmates of the house of reform, who may be sentenced to confinement there from the county. *Id.* 29

RELEASE—See Contracts.

RELIEF—See Mandamus.

RELIGIOUS SOCIETIES—See Statutes.

REMAINDERS—See Judgment; Wills—

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1. Sale of Interest.—A vested remainderman may sell his interest in the property, and pass a good title to the purchaser. *Lindenberger v. Cornell*. 844
2. Remainders—Sale of Interest.—A vested remainder, which is subject to a defeasance may be sold and a good title conveyed by deed to a purchaser, but it will be subject to be defeated, if the event which creates the defeasance occurs. *Id.*..... 844
3. Remainders—Contingent Remainder—Sale of.—Any contingent remainder in real estate may be sold and conveyed, but, unless the dubious and uncertain event, upon which the vesting of the estate depends, occurs at the time, when according to the instrument creating the estate it must occur, to cause the estate to vest, the purchaser will acquire nothing by his purchase. *Id.* 844

REMOVAL—See Officers.

RENT—See Landlord and Tenant.

REPAIRS—See Life Estates.

REPEAL—See Statutes.

REPRIEVE—See Pardon.

REPUGNANCY—See Statutes.

RES GESTAE—See Railroads, 24.

RESCISSION—See Contracts, 16-18.

RESERVATION—See Deeds.

RESIDENCE—See Divorce.

RESTRAINT—See Injunction.

REVIEW—See Appeal and Error; New Trial; Taxation, 10.

REVOCATION—See Licenses.

ROADS—See Highways.

ROBBERY—

1. Nature and Elements in General.—Robbery is the felonious taking by a person of personal property from the owner or rightful custodian, by force or putting him in fear. But to constitute the crime it is not indispensably necessary that the force or putting in fear employed by the taker of the property shall precede the taking; if both, or either, precede or ac-

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- company the taking of the property it will be sufficient. *Armstrong v. Commonwealth*. 217
2. Nature and Elements in General.—The distinguishing characteristic of robbery is the employment of force or intimidation in taking from the person or in the presence of the owner or lawful custodian personal property; while larceny is a taking of such property by stealth, and may or may not be from the person or presence of the one in possession. As the evidence in the instant case showed beyond a reasonable doubt the taking by the appellant, both by force and intimidation, of a valuable diamond ring from the possession of the owner, he was properly convicted of robbery as charged in the indictment; therefore, the refusal by the trial court of an instruction authorizing the jury to determine whether he was guilty of grand larceny was not error. *Id.*..... 217
3. Possession of Burglar's Tools—Evidence.—The admission on the appellant's trial of evidence that a search of his person by a policeman, following his flight and capture near the place of the robbery by that officer, discloses his possession of a pair of brass knucks and some small saws, such as are used by burglars, was not error. Such evidence, in connection with the further evidence of the policeman as to appellant's possession at the same time of the diamond ring of which the owner had just been robbed and a pistol, such as was used in the commission of the robbery, was competent as tending to identify appellant as the perpetrator of the crime, also a motive for its commission and his preparedness for resorting to deeds of violence in committing robbery or kindred crimes. *Id.* 217

SALARIES—See Officers.

SALES—See Auctions and Auctioneers—

1. Conditional Sales.—Whether a transaction giving one, whose property is sold either by the execution of a deed himself or at public sale, the right to repurchase the property within a stipulated time upon stipulated conditions, is to be construed as a mortgage or a conditional sale is one primarily to be governed by the intention of the parties as gathered from all the admissible evidence in the case, and the fact that the conveyance to the vendee who agreed to the reconveyance which creates the defeasance, is absolute in terms will not affect the nature of the transaction, provided it be, as measured by the legal rules for interpreting such transactions, a security for the payment of money. *Miracle v. Stone*..... 610
2. Conditional Sales.—If the vendee in such a transaction is not a creditor of the vendor nor becomes such at the time, nor agrees to become one in the future, so that the relation of

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- debtor and creditor does not exist between the parties, the transaction will be deemed a conditional sale and not a mortgage, and the same will be true notwithstanding the vendee holds a debt against the vendor if the transaction itself extinguishes that debt; neither will a mortgage be created unless the rights of the parties, as well as their remedies, be mutual, i. e., if the vendor may treat the transaction as a mortgage and not as a conditional sale, likewise the vendee should have the same rights and the same remedies, for unless he may sue and recover of the vendor the amount agreed to be paid for the reconveyance and enforce his lien therefor, there are no reciprocal rights, in which case the transaction will be deemed a conditional sale and not a mortgage. *Id.*..... 610
3. Conditional Sales.—Under the facts of this case, as set out in the opinion, the transaction is held not to constitute a mortgage but only an option to repurchase which plaintiff could exercise or not at her pleasure. *Id.* 610
4. Defense to Recovery of Purchase Price.—When, after tests an engine is shown to be worthless, or after discovery of a fraud in its sale the buyer offers to return the same within a reasonable time, there is a complete defense to the recovery of the purchase price; and if he has paid the purchase price under these conditions he is entitled to recover the same. *DeBaun v. Weaver.* 685

SCHOOLS AND SCHOOL DISTRICTS—See Mandamus—

1. Constitutional Law—Right of Fourth Class Cities to Tax Property of White Citizens for the Support of Colored Schools.—Section 187 of the Constitution providing that in distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained, does not forbid the imposition of a tax upon the property of white citizens for the support of colored schools. *City of Pineville v. Moore*..... 357
2. Right of Board of Education in Fourth Class Cities to Levy Annual Taxes for Erection of School Buildings.—Sections 19 and 20, chapter 14 Acts 1920, construed and held to authorize boards of education in cities of the fourth class to levy annual taxes for the purpose of erecting school buildings. *Id.*..... 357
3. Duty of Board of Education of Fourth Class Cities to Estimate the Amount of Money to Be Used to Defray the Expenses of Maintaining the Schools, etc., and Enter the Same Upon the Minute Book of the Board.—The duty of boards of education of fourth class cities under section 21, chapter 14, Acts 1920, approximately to ascertain the amount of money which would be necessary to be used to defray the expenses of maintaining the schools, including a sinking fund, repairs and improvements of buildings, and any liquidation of liability

SCHOOLS AND SCHOOL DISTRICTS—Continued—

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ties falling due within the current fiscal year, etc., and to enter the same upon the minute book of the board, is mandatory, and must be done before the board is empowered to make the levy or to require the general council or fiscal court to include the taxes so levied in their regular tax bills. Id..... 357

4. Time for Board of Education of Fourth Class Cities to Certify to General Council Resolution Levying School Taxes.—Under section 19, chapter 14, Acts 1920, providing that the board of education of fourth class cities shall, within thirty days prior to the time for the levy to be made in the charter of cities of the fourth class approximately ascertain the amount of money which will be necessary to be used, etc, and authorizing and directing it to pass a resolution imposing taxes for school purposes, etc., and directing it forthwith to certify the resolution to the general council, the time for making the levy not being otherwise definitely fixed, the board of education should certify the resolution to the general council within thirty days prior to June 1st, the time the clerk should begin the work of making out the tax bills, since sections 3535, 3536, 3542 and 3543, Kentucky Statutes, contemplate that the general council shall make the levy before that time. Id..... 357
5. Cities of Fourth Class—Duty of Board of Education to Certify Resolution Levying Taxes to General Council Within Thirty Days Prior to the Time Prescribed by the Charter for the Levy to Be Made by the General Council.—The duty of the board of education of a city of the fourth class to certify to the general council the resolution levying taxes for school purposes within thirty days prior to June 1st of each year is mandatory in view of the concluding provision of section 19 to the effect that if in any year the board shall fail to pass the resolution and make the certificate and request as aforesaid, the general council or its board of commissioners and fiscal court shall make a levy for schools that shall be the same as it was the year before, and a resolution not certified until July 20th comes too late. Id. 357

SCINTILLA OF EVIDENCE—See Wills.

SEARCHES AND SEIZURES—

Warrant.—Under section 10 of our present Constitution, and article 4 of the amendments to the Federal Constitution, it is unlawful for an officer to search the premises, houses or possessions of a suspected offender without a duly issued search warrant authorizing him to do so, and evidence seized as a result of such unlawful search may not be used against the supposed offender in his trial on a charge subsequently brought. But if the search, though made without a warrant, is done with the permission, voluntary agreement and con-

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sent of the one rightfully in possession of the thing searched, the above rule will not apply and articles found as a result thereof may be relied on by the Commonwealth as evidence against the offender. *Banks v. Commonwealth*..... 330

SERVICES—See Executors and Administrators; Pleading.

SETTING ASIDE—See Appeal and Error; Bastards.

SETTLEMENT—See Executors and Administrators.

SEWERS—See Municipal Corporations.

SIGNATURE—See Wills.

SLANDER—See Libel and Slander.

SPECULATIVE DAMAGES—See Damages.

SPOILIATION—See Taxation, 7.

STATES—

1. Certification of Amount Due Prisoners.—A provision in the act that "At the end of each month the board of prison commissioners shall certify to the auditor of public accounts the amount due each prisoner for that month, and he shall draw warrant on the state treasurer for the amount so certified" is an appropriation within the meaning of section 230 of the Constitution. *State Board of Charities and Corrections v. Hays; Same v. Combs*..... 147
2. Payment of Per Diem to Convicts—Board of Charities and Corrections.—The provision in an act of the legislature for the payment to convicts of a small per diem for their labors, subject to forfeiture for violations of rules of misbehavior, is a reasonable exercise of the police power of the state, which can not be delegated to a board of prison commissioners. *Id.* 147
3. Payment of Per Diem to Convicts.—The act provides that the board of prison commissioners shall provide rules and regulations for the payment of not less than five nor more than fifteen cents per day to each convict for his labor. Held that the payments are gratuities and not wages and may be granted or withheld or withdrawn by the legislature at any time before payment; and that the power conferred upon the board to determine by rules and regulations the amounts thereof within the prescribed limits is administrative and not legislative. *Id.* 147
4. Payment of Per Diem to Convicts—Constitutional Law.—The proposed payments as rewards for obedience and service and looking to the reformation of the convicts are not within the inhibition of article 3 of the Bill of Rights that "No grant of

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- exclusive, separate public emoluments or privileges shall be made to any man or set of men except in consideration of public services." *Id.* 147
5. Memorial Buildings—Monuments—Use of Public Money.—The reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals is for a public purpose, and within the power of the state legislature. *Barrow v. Bradley, Mayor*..... 480
6. Limitation of Amount of Indebtedness or Expenditure.—Section 49 of the Constitution forbids the General Assembly from contracting debts, except for the purposes of meeting deficits or failure in the revenue, for which purposes debts, direct or contingent, singly or in the aggregate to the amount of \$500,000.00 may be contracted, but the moneys arising therefrom shall be applied only to the purpose or purposes for which they are obtained or to repay the debt or debts so contracted. *Crick, County Judge v. Rash*..... 820
7. Limitation of Amount of Indebtedness or Expenditure.—Section 50 of the same instrument forbids the contracting of any debt by the General Assembly, or it authorizing the contracting of any debt, except for the purposes stated in section 49, without making provision at the time for the collection of an annual tax sufficient to pay the interest and to discharge the debt within thirty years, and that before the act shall take effect it shall be submitted to the people of the state at an election and receive a majority of the votes cast therein. *Id.*..... 820
8. Limitation of Amount of Indebtedness or Expenditure.—A debt within the meaning of the constitutional provisions, is any obligation to pay money on the part of the state at some fixed future time, or a time which may become definite and fixed by act of either party and which act they expressly or impliedly agree to perform in the contract creating the debt; but the inhibitions of the constitutional provisions do not apply to, or include debts so contracted in anticipation of, and which may be paid out of the revenues of the state already levied or to be collected for the fiscal year in which the contract is made; nor to a debt so contracted to be paid out of revenue already in the treasury for the purpose; nor to a debt to be paid out of a special fund, provided such special fund, is not and never becomes the property of the state; but it is not competent for the legislature to indirectly evade the constitutional provisions under the latter rule, by providing that the debt shall be paid out of a specially designated fund, insufficient at the time and which itself is a part of the revenues of the state and which is collected under the authority of the legislature to levy and collect taxes. *Id.*..... 820

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9. Limitation of Amount of Indebtedness or Expenditure—Loans by Counties.—The loans or advancements by the various counties of the state to the Commonwealth under the provisions of section 11 of chapter 17, Acts 1920, page 76, constitute debts of the state within the meaning of the two sections of the Constitution referred to, and if such debts in the aggregate, together with other outstanding obligations of the state, may not be met or paid by anticipating the revenues of the state for the year or with money in the treasury available for road purposes, or out of any special fund, as above defined, they are prohibited by said sections of the Constitution and are void. *Id.* 820
10. Aid to Counties for Construction of Roads.—Section 157a of the Constitution did not in any manner repeal either section 49 or section 50 of that instrument so as to authorize the state to contract debts with the counties to an unlimited amount for the purpose of constructing roads. The only effect of the newly adopted section was to permit the state to extend to the counties its credit for the construction of roads, but which credit was only such as the Constitution allowed and which it could not extend to the counties for that particular purpose (section 177, Constitution) before the adoption of section 157a. *Id.* 820

STATION AGENT—See Railroads.

STATUTES—See Constitutional Law—

1. Subjects and Titles of Acts.—An act of the general assembly which has but one subject, and that is expressed in its title, and all the provisions of the act have a natural connection with the subject expressed in the title, is in conformity with the requirements of section 51 of the Constitution. *Lang, Judge v. Commonwealth.* 29
2. Enactment, Requisites and Validity in General.—Bills for raising revenue, as mentioned in section 47, of the Constitution, are bills for the levying of taxes, in the strict sense, and a statute, the requirement of which may incidentally cause the collection of revenue is not void because it has its origin in the senate. *Id.* 29
3. Subjects and Title.—An act of the legislature which relates in both its title and body to more than one subject is wholly void under section 51 of the Constitution. *State Board of Charities and Corrections v. Hays; Same v. Combs.* 147
4. Subjects and Title—Working Prisoners.—Chapter 36 of the 1916 Acts of the legislature relates to working all prisoners in the state penitentiary within and without prison walls and to paying all of them a small per diem for their labor and every feature of the body of the act is specifically covered

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- by the title. Held that labor and payments therefor are not unrelated subjects and the act is not violative of section 51 of the Constitution. Id..... 147
5. Enrolled Bills—Impeachment.—An enrolled bill signed by the proper officers and approved by the Governor can not be impeached by the journals of the house and senate. Id..... 147
- 6 Repeal—Repugnancy.—An act will not be held to have been repealed by a later act by implication in the absence of clear repugnancy and where the same legislature by a still later act expressly repealed and re-enacted the original act. Id..... 147
7. Repeal—Repugnancy.—Ordinarily the repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute but as a continuation thereof; but where the repeal and re-enactment of an act which authorized payment of gratuities could have had no other purpose except to withdraw gratuities which had been authorized but not paid under the original act and grant them anew such effect should be given the legislative action rather than so construe it that it would have been a vain and foolish thing. Id..... 147
8. Convicts—Board of Charities and Corrections.—The only right conferred upon the convicts by either act was the right to a mandamus against the board of prison commissioners requiring them to carry out the mandatory provisions thereof. Id. 147
9. Repeal—Claim Under Existing Law.—Section 456 of the statutes which merely protects from repeal an accrued right or claim arising under an existing law is not applicable and can not be invoked in behalf of a claim to a mere gratuity that is withdrawn before payment. Id..... 147
10. Construction—When Resort May Be Had to Statutes from Which Present Statute Was Derived.—In construing a statute whose language is plain and unambiguous, the courts will inquire no further, but if the matter is left in doubt and uncertainty, resort may be had to the original acts from which the statute was derived. Trustees Baptist Female College v. Barren County Board of Education. 565
11. Colleges and Universities—Religious Societies—Construction of Section 323, Kentucky Statutes.—Section 323, Kentucky Statutes, providing that "if any society holding land shall dissolve, title thereto, with its appurtenances, shall vest in the trustees of the county seminary, or in the county court for the benefit of the common schools," construed in the light of its language and the prior statutes from which it was derived and held to apply only to religious societies, and not to a corporation holding land solely for the benefit of an educational institution. Id. 565

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1. Collision of Automobile With Car—Trial—Instructions.—In such a case the court properly refused an instruction telling the jury that if they believed from the evidence that the vehicle in which plaintiff was riding got on to the street car track so close to the front end of the street car, that if the said car was running at a reasonable rate of speed, the motor-man under the conditions then and there existing could not by the exercise of ordinary care in the use of the means at his command have perceived the danger to the plaintiff and stopped the car in time to have avoided injury to her, then, notwithstanding that the speed of the car was excessive, the law was for the defendant and the jury should so find, since the case was not one where the collision was caused by the truck's suddenly coming on the track, but by its suddenly stopping on the track, and this defense was presented by another instruction more favorable than defendant was entitled to. *Louisville R. Co. v. Koob* 283
2. Collision of Automobile With Car—Personal Injuries—Evidence of Permanent Injuries Question for Jury.—In a suit against a street railroad for personal injuries, evidence of permanent injuries held sufficient to take the case to the jury. *Id.* 283

SUBMISSION TO JURY—See Criminal Law; Waters and Water Courses.

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TAXATION—See Counties; Municipal Corporations; States—

1. Equality and Uniformity.—The uniformity in taxation required by section 171 of the Constitution means that the taxes levied must be uniform and equal upon the taxable property of the unit of taxation, in which the taxes may be lawfully levied. *Lang, Judge v. Commonwealth* 29
2. Failure to Assess Land—Forfeitures and Penalties.—In an action under the provisions of article 111, chapter 108, Ky. Stats., for the forfeiture of titles to lands, for the non-assessment and non-payment of taxes, and the owners and claimants are unknown to the Commonwealth's attorney, and the defendants to the action are designated as "unknown owners and claimants," and the proper warning order and publication are made as required by the statute, *supra*, the owner or claimant of a title to the lands, has a right to file answer and resist the forfeiture of his title or claim. *Bryant v. Commonwealth*, 370

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3. Failure to Assess Land—Forfeitures and Penalties.—In a proceeding under article 111, chapter 108, Ky. Stats., for the forfeiture of title to lands because of the non-assessment and non-payment of taxes thereon, the court is not required to adjudicate upon the validity of the title of a claimant, nor is the Commonwealth's attorney authorized to make an issue between the Commonwealth and a claimant as to the validity of the claimant's title; nor will the court be required to adjudicate as between the titles of different claimants, until after a judgment or forfeiture has been rendered and counterclaims are filed by claimants desiring to redeem the titles forfeited, as provided by section 4076a, Ky. Stats. Id..... 370
4. Forfeitures and Penalties.—In a proceeding under article 111, chapter 108, Ky. Stats., before a judgment of forfeiture is rendered, the only issues are between the Commonwealth and the owners or claimants of titles, and the issue relates, alone, to the question, whether the title or claim of an owner or claimant is liable to forfeiture for the non-assessment and non-payment of the taxes. Id..... 370
5. Power to Tax.—The power to tax is a sovereign power legislative in character. *Barrow v. Bradley, Mayor.* 480
6. Authority to Make Assessment.—Where the board of valuation and assessment has duly considered a report filed by a railroad company in fixing the value of its franchise, the conclusion of the board is final where it had before it the data necessary to enable it to fix a proper valuation upon said franchise—no fraud being shown. *C. & O. Ry. Co. v. Commonwealth.* 552
7. Spoliation.—If the assessing board acts corruptly or fraudulently or makes an assessment amounting to spoliation or by mistake or oversight the property is so assessed as to amount to double taxation, adequate relief will be granted an aggrieved taxpayer. Id. 552
8. Failure to Assess Property.—Failure of a corporation to report any item or species of property that it is called upon to report together with its value is an omission and not an undervaluation of its property and may be assessed in a suit brought for that purpose. Id. 552
9. Omitted Property.—In a suit to assess alleged omitted property the Commonwealth must first show the omission of any property that should have been reported together with its nature and value and when this is done the corporation must show by clear and convincing evidence that notwithstanding the omission the board in making the assessment considered and assessed the value of the alleged omitted property from information gathered from sources outside the report. Id..... 552
10. Omitted Property.—In a suit to assess alleged omitted property where the testimony conclusively shows that the assessing

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board had before it the information necessary to enable it to arrive at a fair valuation the petition should be dismissed. *Id.* 552

11. Review of Assessment.—It is alleged that a railroad company in making its report to the auditor included in the item designated "other expenses" various items which were in reality profits and not expenses, but since the evidence conclusively shows that the details of the several items were explained to the members of the board and they were fully apprised as to the nature thereof, the board having before it the same data as presented by the present record, this court is without power to review the action of the board, which under the circumstances is final. *Id.* 552

TERM—See Officers.

THREATS—See Assault and Battery.

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TRANSCRIPTS—See Appeal and Error.

TRIAL—See Appeal and Error; Railroads; Street Railroads—

1. Instructions.—Brevity in statement and clarity of expression should be employed in the drafting of instructions. *Pugh v. Eberlein.* 386
2. Conduct of.—Courts should disregard such errors or mistakes as do not affect the substantial rights of the complaining party. *Id.* 386
3. Exclusion of Evidence from Consideration.—On the issue whether a machine was capable of doing the work for which it was purchased, evidence of the plaintiff that in his tests of the same it would not run successfully but that when the seller came he would do something to it and it would run again, did not authorize the court upon the mere inference drawn from this statement to take the case from the jury upon the idea that it showed the defect was not in the machinery but in the improper operation of it. *DeBaun v. Weaver.*..... 685
4. Statement of Issues.—Where a machine is sold for a special purpose, but consists of three separate parts; the chassis, containing the engine; a patented attachment; and plows, and the requirement of power in the engine was the essential thing involved in the purchase, the sale was one of an engine as an entirety and not of separate parts thereof, and the total

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failure of the engine to furnish the power necessary to accomplish the purpose was a failure of the whole, and the court properly instructed the jury that if they found for the plaintiff to find the whole purchase price. *Id.*..... 685

TRUSTS—

1. Deed Will Support Conveyance.—A deed of trust which empowers the trustee to convey or mortgage the real estate upon the written request of the life tenant named therein and which deed specifically relieves the purchaser or mortgagee from the necessity of looking to the application of the purchase money will support a conveyance of the said real estate by the trustee in satisfaction of a mortgage debt equal to the fair cash value of the land. *McNeal v. Smith.* 355
2. Termination—Disposition of Property.—By an act of the General Assembly, a corporation designated by the name of "Trustees of the Baptist Female College of Liberty Association," was created with power in the trustees "to purchase or receive by donation, devise, or bequest, any lands, tenements, hereditaments, rents, goods and chattels and to hold the same by the same aforesaid to them and their successors forever, for the use and benefit of said institution, and according to the intention of the donor or donors." After the creation of the corporation certain donations were received for the purpose of purchasing land, erecting buildings thereon and building a school. While these donations came principally from Baptists, many of them were received from members of other churches. The school failed and it became necessary to sell the property to pay its debts: Held, that the surplus proceeds, after paying the debts of the institution did not belong to the liberty association or any of its churches. *Trustees of Baptist Female College of Liberty Association v. Barren County Board of Education.* 565
3. Termination—Dissolution of Seminary—Disposition of Property.—Where donations of property are made to trustees to be held by them for the use and benefit of an educational institution, and according to the intention of the donors, and the trust fails, the surplus proceeds, after discharging the debts of the institution, revert to the original donors or their heirs. *Id.*..... 565
4. Parol Evidence.—Parol evidence of the existence of a trust in land is required to be clear, convincing and most satisfactory, and particularly will it be closely scrutinized after the death of one or more of the interested parties. *Lacey v. Layne* 667
5. Constructive Trust—Evidence.—Evidence examined and held to be insufficient to establish a constructive trust, or that the decedent held the title as security for money. *Id.*..... 667

UNDUE INFLUENCE—See Deeds; Wills.

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VENDOR AND PURCHASER—See Negligence—

1. Bonds for Title.—A title bond is a contract to convey and can not take the place of a recorded deed, and while it is insufficient to pass a legal title it gives to the holder an equitable right superior to the claim of title on the part of a subsequent purchaser with notice. *B. P. Jones & Co. v. Cash* 96
2. Bonds for Title.—Actual possession of land under a title bond is notice to would be purchasers of the fact that the possessor who claims to own it has an interest in the property. *Id.* 96
3. Bonds for Title.—A subsequent purchaser with actual notice of the claim of one in possession under a title bond takes subject to the rights of such possessor. *Id.* 96
4. Bona Fide Purchaser—Constructive Notice.—Where the land conveyed is located in the mountains, where the quantity of land is often estimated and accurate surveys are not always made, the mere fact that the purchasers had the land surveyed, and the survey showed that a prior deed embraced a few more acres than the number stated in the description was not sufficient to put them on inquiry to ascertain if there was a mistake in the deed. *Johnson v. Beaver Creek Fuel Co.*..... 499
5. Action for Fraud and Deceit.—A vendee of land, who has been induced to purchase it, by false representations as to the title, knowingly made by the vendor, with the intention to deceive and to induce the purchase, and suffers injury thereby may maintain an action for damages for the fraud and deceit, and in such action may recover all his actual damages. *Sellards v. Adams.* 723
6. Action for Fraud and Deceit.—In an action brought by a vendee against the vendor for damages because of actual fraud practiced upon him by the vendor, in inducement of the sale, as false representations knowingly made with reference to the title, with the intention to deceive, and in reliance upon which the purchase was made, the insolvency or non-residence of the vendor does not have any effect. *Id.*..... 723
7. Action for Fraud and Deceit.—Although a vendee has received a deed, which contains covenants of warranty covering the defects in the title complained of, he may maintain an action of deceit for the damages suffered by him, on account of an actual fraud perpetrated by the vendor upon him in inducing the purchase of the property. *Id.*..... 723
8. Breach of Covenant.—If one relies upon the covenants in his deed he must be confined to such recovery as is permitted for a breach of such covenants, and the necessary facts must exist to sustain a cause of action for such breaches. *Id.* 723
9. Title as Against Third Party—Licenses.—Where a vendee purchases property, over which a telephone line has been con-

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- structed, under a parol license from his vendor and the telephone line is open and visible, he purchases subject to the right of the telephone company to maintain such line, and even if the owner had the right to revoke the license and require the removal of the structure, such right does not pass to the vendee. *Lashley Telephone Co. v. Durbin*..... 792
10. Title as Against Third Party—Licenses—Estoppel.—Under such circumstances the telephone company's right in the premises is limited to the maintenance of the telephone line as it existed at the time of the purchase, and the purchaser is not estopped to complain of the stringing of additional wires. *Id.* 792

VERDICT—See Appeal and Error; Criminal Law; Damages.

VIEWERS—See Highways.

WAIVER—See Appeal and Error; Jury; Pleading.

WARRANT—See Searches and Seizures.

WASTE—See Receivers.

WATER CLOSETS—See Railroads.

WATERS AND WATER COURSES—

1. Overflow—Measure of Damages.—Where a permanent obstruction is erected by a railroad company in a river which caused the water to overflow the lands of another, the measure of damages to which the landowner is entitled is the difference in the reasonable market value of the lands immediately before the obstruction was placed in the river and immediately thereafter. *Coleman v. L. & N. R. R. Co.*..... 17
2. Damages—Cause of Action.—In such case a plaintiff can have but one recovery, for he must sue for all damages past, present and prospective or contingent, and his cause of action accrues when the structure is completed, or at least when first injury is occasioned. *Id.* 17
3. Damages—Submission to Jury—Instructions.—In an action to recover damages for the wrongful flooding of lands by diverting surface water from the upper estate on to the lower, any substantial change in the ditches or contour of the upper estate which took place within five years next before the bringing of the action, and which cast the water upon the lower estate in greater volume or with greater destructive force than that in which it ordinarily ran, to the damage of the lower estate, will warrant the trial court in submitting the case to the jury, and the finding of the jury under proper instructions will not be disturbed unless palpably against the weight of the evidence. *Steinke v. Mount Vernon Lbr. Co.*..... 231

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4. Easements.—Where a stream in its natural condition is capable of being used to float logs, etc., and has in fact been so used for that purpose, the public has an easement in it and the right to so use it, but not in such a manner as to destroy by neglect the property of those on the banks of the creek. *Floyd County v. Allen.* 532

WILLS—

1. Advancements.—One who claims and takes under a will can not deny that an amount charged as an advancement by testator to one of his devisees was made by the testator out of funds belonging to him and assert claim to one-half thereof upon proof that the advancement was made out of funds belonging to him and testator jointly. *Shields v. Shields.*..... 109
2. Construction—Intention of Testator.—The cardinal rule in the construction of wills is to ascertain, if possible, from the language in the entire will the intention of the testator, and to construe it so as to carry out that intention; but, the intention thus to be arrived at is the one which the testator expressed by the language used and not the one which he intended to but did not express. *Marquette v. Marquette's Executors.*..... 182
3. Construction—Intention of Testator.—Where from the language employed in the entire will, there exists an uncertainty, repugnancy, or an apparent ambiguity, it is competent for the court to permit testimony showing the surrounding circumstances and conditions of the testator at the time he executed his will for the purpose, if possible, of ascertaining his intention; but where the language employed in its ordinary and usually understood meaning is free from uncertainty, extraneous evidence will not be resorted to. *Id.*..... 182
4. Signification of Word Children—Intention of Testator.—The primary, usual and ordinarily legal signification of the word "children" is "legitimate children," and the term as used in a will will not include illegitimate children, unless it expressly, or by necessary implication appears from the will itself that it was the intention of the testator to include in the word "children," illegitimate children. *Id.* 182
5. Remainders.—A devise of land to the son of testatrix created in him a vested estate in remainder notwithstanding a provision in the will that the devisee should care for and maintain his parents during their lifetime, there being no devise or limitation over in the event of failure on the son's part to make the requisite provision. *Grubbs, Exor. v. Grubbs, Exr.* 253
6. Remainders.—In cases of doubt it will be presumed that testatrix intended to devise an absolute rather than a qualified estate and since the law favors the vesting of estates, no remainder will be construed as contingent which may, consistently with the intention of testatrix, be deemed vested. *Id.*.... 253

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7. Failure to Perform Condition.—Where there is no devise or limitation over to take effect upon the failure of performance of an annexed condition the failure to perform the condition, though precedent, will not work a forfeiture of the devise, such condition being construed to be a subsequent condition. *Id.* 258
8. Limitation Over.—Where there is an absolute devise of the whole estate a limitation over by way of remainder of the undisposed of estate is void. *Linden v. Llewellyn's Admr.*..... 388
9. Intention of Testator.—Testator's intention as gathered from what is written in the will as an entirety, will control where the intention so gathered does not conflict with some positive rule of law. *Id.* 388
10. Construction.—Under a will by which testator directed that the residue of his property be divided equally between his brothers and sisters, naming them, "and the nieces and nephews of my brothers and sisters who are living at the date of my death, and my sisters-in-law whose husbands are dead, viz., Dulcina Darnell and Lina Darnell, and Mary Jones, my deceased wife's sister, who resides in Urbana, Illinois, and Oddie L. Power, my great-niece, all of whom mentioned are to share equally alike," held that the words, "nieces and nephews of my brothers and sisters who are living at the date of my death," include the children not only of the testator's deceased brothers and sisters, but of his living brothers and sisters, and therefore all the testator's nieces and nephews. *Darnell's Ex'rs v. Darnell.* 468
11. Limitation Over.—A limitation over, after the grant of a fee simple estate is void. *Thurmond v. Thurmond.*..... 582
12. Restraint Upon Alienation.—After a devise of a fee simple estate, an attempt to restrain its alienation during the entire life of the devisee is void. *Id.* 582
13. Presumption Against Intestacy.—The presumption against intestacy, partial or whole, is not indulged, nor can the rule which favors the vesting of estates be invoked, when overcome by the plainly expressed intent of a testator to do otherwise. *Id.* 582
14. Intention of Testator.—The character of an estate devised to a devisee, by a will must be determined by an ascertainment of the intention of the testator, which must be arrived at, by a consideration of the entire will, and effect must be given to every part of it, where it is possible to do so. *Id.*..... 582
15. Limitation Over.—A limitation over after a life estate is valid, and where a life tenant is granted the power to dispose of the property a valid limitation over may be made of any of the estate which may remain undisposed of at the death of the life tenant. *Id.* 582

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16. **Scintilla Rule—Mental Capacity.**—The scintilla rule prevails in will contest cases the same as in others and applies to the issue of mental capacity of the testator as well as to other issues in such cases; but the quantum of testimony necessary to raise a scintilla of evidence must be such as to induce conviction and not consist in vague, uncertain and isolated acts and circumstances which are consistent with rationality, although they may be inconsistent with the usual normal course pursued by the generality of mankind. It is furthermore the trend of later opinions of this court, in applying the scintilla rule in will contests and in other cases, to discard the illogical practice of drawing a distinction between the quantum of testimony necessary to create a scintilla of evidence and the quantum necessary to sustain a verdict as not being flagrantly against the evidence. *Wood v. Corcoran, Admr.* 621
17. **Mental Capacity—Burden of Proof.**—Where a will is rational and equitable upon its face the burden is upon the contestant to sustain the grounds of contest and in such cases non-expert witnesses may give their opinions concerning the testator's mental capacity, but such opinions not based on sufficiently convincing facts to support them will not authorize the setting aside of the will, but where the facts testified to by such witnesses are sufficient, when measured by common experience, to show a derangement of mind, their opinions based upon such facts (as strengthened by the facts themselves) will authorize a submission of the issue to the jury and, unless overcome by sufficient testimony, will sustain a verdict setting aside the will. *Id.* 621
18. **Sufficient Testamentary Character of Letter.**—In a letter stating the writer did not expect to live long and that in the event she did not get to make a contemplated visit to town she wanted certain disposition made of her property, is of sufficient testamentary character as to authorize its probate as the last will of the writer. *Wells v. Lewis, Adm'r.* 626
19. **Signature.**—The signature "Ant Nanie" to a letter, construed as a will is a sufficient signature of the writer's name. *Id.*..... 626
20. **Requisites and Validity.**—No particular form is required for the disposition of property by will. The distinguishing feature of all testamentary documents is that the writing must appear to have been written *animo testandi*. *Id.*..... 626
21. **Testamentary Capacity—Execution.**—Ordinarily the only proper and necessary matters to be considered and determined in proceedings to probate a will are the testamentary capacity of the testator, the due execution of the will in accordance with statutory requirements and the presence or absence of fraud, mistake or undue influence. *Id.* 626
22. **Life Estates—Intention of Testator.**—It is well settled that where a life estate has expressly been created by a will, the

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- estate devised will not be deemed enlarged by a subsequent provision of the instrument, unless the language thereof is so explicit in statement and meaning as to clearly show that such was the intention of the testator. *Wright v. Singleton* 657
23. Limitation to Life Estate.—Where the devise is expressly limited to a mere life estate in the devisee named the limitation to a life estate can not be affected by the failure of the will to devise the remainder, as in such event the estate upon the death of the life tenant will go, as in case of intestacy, to the heirs of the testator entitled to take under the statute. *Id.* 657
24. Heir at Law—Right of—Intention of Testator.—The heir at law does not take by the act or intention of the testator. His right is independent of the will, and to deprive him of it the language of the will must plainly manifest an intention on the part of the testator that he shall not take. *Id.* 657
25. Life Estate.—The language of a will declaring that the widow of the testator is given his entire real and personal estate "to her and for her absolute use and benefit while she lives," and making no disposition of the estate to take effect after her death, vests in her a life estate in the property devised, which at her death will go to the testator's heirs at law. *Id.* 657
26. Per Capita Distribution.—Where the subject of a testamentary disposition is directed to be "equally divided," or to be divided "share and share alike," or where similar words are used which indicate an equal division between or among two or more persons, a per capita distribution will be made of the property unless a contrary intention is discoverable from the language used in the will. *Fischer, Admr. v. Lange* 699
27. Construction.—A testator in devising the remainder of his property after making specific devises said: "I give, devise and bequeath in equal shares to my said daughter, E. A. F., and the two children of my deceased daughter, E. N. and N. L. . . . to them, their heirs and assigns forever." There was no word or expression in that clause nor in any other part of the will indicating the character of division which should be made of the property therein mentioned among the devisees mentioned. Held, that under the rule first stated above a per capita division should be ordered of the property. *Id.* 699
28. Funeral Expenses of Life Tenant.—None of the corpus of an estate may be applied to the payment of funeral expenses or debts of the life tenant of the property, who was also executrix of the will under which she held it, and an administrator de bonis non of the testator, after the life tenant's death, can not receive credit for the amount of such debts which he paid after the death of the life tenant. *Id.* 699

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29. Undue Influence.—On the issue of undue influence in a will contest, it is often necessary, in weighing evidence, to group together and draw conclusions from a multitude of apparently insignificant things, but which when all considered together tend to show such influence. *Sheeran v. Jarboe*..... 840
30. Undue Influence.—Evidence examined in a will contest and held to have been sufficient to submit to the jury the issue of undue influence. *Id.* 840

WITNESSES—

Impeachment.—Before a witness who is not a party to the suit may be impeached by proving contrary statements which he made out of court a foundation must be laid for the introduction of such contrary statement by inquiring of the witness concerning the statement with the circumstances of time, place and persons present, and this rule applies in criminal as well as civil cases. *Banks v. Commonwealth*..... 330

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